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RECENT AMERICAN DECISIONS.

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ABSTRACTS OF RECENT AMERICAN DECISIONS.

ERRATUM.—The Abstracts of Pennsylvania Decisions, in our last number, were, by some oversight, credited in a note on page 60 to *Mr. Grant*, instead of to MR. WRIGHT, the State Reporter, to whose courtesy we were really indebted for them.

THE

AMERICAN LAW REGISTER.

DECEMBER, 1861.

ON THE INTERVERSION OF POSSESSION;

OR,

WHETHER A PARTY MAY CHANGE THE CAUSE OF HIS POSSESSION.

It was a rule of the Roman law, that a man who was in possession under a title emanating from another, might not make interversion, and commence to hold independently of the title to which his holding was subordinate, *cum nemo causam sibi possssionis mutare possit.*[1] No man might change the cause of his possession, and hold adversely to the right under which he entered, unless the character of his possession was changed by some cause without. There could be no interversion, *nulla extrinsecus accedente causa.*

Savigny[2] is of opinion that the rule in question had not been properly understood by most writers, especially before the discovery of the Institutes of Gaius. He says that it seems to have been supposed that the rule rendered it absolutely impossible, even with the co-operation of a third party, to change the cause of possession, though such is not the meaning of the rule; for if the possessor in bad faith of a thing, purchase it of the proprietor, or of him whom he supposed to be such, the cause of the possession is completely

[1] L. 5, Code de Acq. Poss. [2] Tr. de la Poss., p. 69, Edition of 1812, Paris.

and effectually changed; and, on the other hand, if the tenant expels the lessor, he has effectually changed the cause of possession from the *causa conductionis* to the *causa dejectionis*, and will thus arrive at true possession. The rule opposes no obstacle to such a change, and there was no necessity for a positive prohibition, for the lessor is sufficiently protected by the interdict *de vi*, and the expulsion or ouster could never, by the Roman law, be a step to *usucapion*. The rule, therefore, he considers applicable to those few cases where an unjust and arbitrary cause might be changed to one which was valid and efficacious, but where *usucapio* was prevented by the application of a rule altogether positive in its nature, as in the following cases. Before the heir has taken possession of the things belonging to the succession, any one might take possession of those things and acquire title by *usucapion* as heir, (*pro herede.*) For usucapion in such a case, by the Roman law, neither good faith nor a just title being required, one year only was necessary to its accomplishment, even for immovable property. This, therefore, was a cause of possession to which the positive rule of prohibition was applicable, for it was founded upon a dishonest intent of the party taking possession, and was nevertheless a just cause of usucapion, *justa usucapionis causa*, which distinguished it entirely from the case of a lessor expelled by his tenant. The reasons for the recognition of a possession so unjust, and of the usucapion founded therefrom, were special, and the law itself was changed by Adrian.

The ancient rule, *nemo sibi causam possessionis mutare potest*, applied in the following manner. If one was in possession as a purchaser, (*pro emptore,*) and was in the course of acquiring title by usucapion in that character, or if he had natural possession of a thing as depository or bailee, on the death of the true proprietor, *usucapio pro herede*, usucapion in the character of heir, might be of great advantage to each of these possessions. The purchaser of immovable property acquired title in one year, instead of two, which were necessary in his character of purchaser, and the depositary or bailee, to whom in that character usucapion was impossible, was thus enabled to acquire a right by usucapion. The rule *nemo*, &c.,

that no one may change the cause of his possession, might be opposed to such possessions. Those who had once commenced to possess in a certain manner, were not permitted, with a consciousness of its unlawfulness, to change that possession to a *possessio pro herede*. Such, according to Savigny, was the design of the rule in question, though he admits that it has entirely lost its true signification since the time of Justinian. The rule by which possession at the common law is affected, and which is far from being understood as an arbitrary or positive rule, is the same which was applicable, under the law of Justinian, to prescription *longissimi temporis*, or cases of possession for thirty years, and the principle of the rule still applies to possession which commences lawfully and in subordination to title.

The meaning of the rule is, that a man shall not change, by his own act, the character of his possession, so as to give effect to usucapion or prescription. That a tenant, who entered under a rightful title and acknowledged the authority of his lessor, might acquire possession by the simple act of expelling his lessor, although he could not, by the old law, render possession thus acquired available to usucapion, is sufficiently apparent from the texts of the Digest.[1] Possession, says Cujas, does not require good faith, though usucapion demands good faith.[2] Possession is not always available to usucapion.[3] Although violence prevents alike usucapion and prescription *longi temporis*, it does not obstruct prescription *longissimi temporis*, where there has been a possession of thirty years after the act of violence has ceased.

The lessee, therefore, who had, under certain circumstances acquired the possession of land leased to him by violence, that is, by holding out the lessor and denying his title, acquired an absolute right by the law of Justinian, after a possession of thirty years.

The rule in question has application to all cases at the civil law, or the common law, in which prescription may be effectual, though not founded upon a title commencing in good faith.

The principle of the rule is independent of any positive regula-

[1] D. 43, 12, 16, and 18.

[2] Cujacius, vol. 6, p. 663.

[3] Cujacius, vol. 3, p. 285, ch. 12.

tion; it is that a person who has acquired a possession subordinate to another's right, shall not, by the act of his own mind, change the character of that possession, and at his own election hold independently and adversely.

"The sense of the rule," says D'Argentrée,[1] "is that no man shall mentally, alone, and by a silent thought, change the cause of his possession—that is, elect to hold for a different cause from that for which he had previously held." "So no man, by his intention alone, can change the nature of possession which he has received to hold in another name; for example, if a tenant should resolve to make no further payment to the owner of whom he held, no interversion of possession is effected by the operations of his own mind. Some act is necessary."

Interversion is effected by a conveyance from the owner of land to his tenant, who thereafter will hold in virtue of the extrinsic cause contemplated by the rule, and also when the land comes to the tenant by descent.

The cause of possession may also be changed by a conveyance from a third person claiming to be the owner of the land. If the tenant is aware that the person from whom he thus derives title, is not the true owner, he will be a possessor in bad faith, but he may prescribe after thirty years by the civil law.[2]

The question has been considered by French writers, whether after such a conveyance from a third person to the tenant, some refusal or act equivalent to an expulsion was necessary, in reference to the owner, to mark a change in the character of the possession. Dunod[3] says, that if the tenant refuses, after a title thus derived, to yield any part of the profits to the owner, if he declares to him that he will no longer hold the land under him, but that he will enjoy the land as his own, this will be a change in the character of the possession by an extrinsic fact, unjust indeed, but which, nevertheless, is the commencement of a possession, the cause of which is changed for him, but not by himself.

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[1] D'Argentree, art. 265, ch. 4, p. 863.

[2] D'Argentrée, art. 265, ch. 4, Nos. 29 and 30.

[3] Dunod, Tr. des Prescriptions, p. 36.

S'il refuse apres cela de faire part des fruits à son maitre; s'il lui déclare qu'il ne veut plus tenir de lui ces heritages, mais qu'il en veut jouir comme des siens propres, ce sera un changement de possession par un fait exterieur, injuste a la vérité, mais qui ne laissera pas de donner commencement à la possession, quia non sibi mutare sua ipsi mutari dicetur causa possessionis.

The acquisition of a new title, it would seem, was not considered by this writer as sufficient to effect an interversion, unless with a refusal on the part of the tenant to account for the profits. A denial of the right of the owner, as well as a new title, was supposed necessary to change the cause of possession. Troplong controverts this notion,[1] and is of opinion that a denial of the right and a refusal to account is important only as giving publicity to the newly acquired title, and as excluding the vice of clandestinity. The title, he says, is only effectual when it is sustained by a possession which is neither equivocal nor clandestine. It is necessary, in order to effect a change in the character of the possession, that the owner should have notice of the new title. If the tenant permits the party, in subordination to whose right he had possession, to remain in ignorance of the conveyance, the cause of the possession will not be changed, but if he communicates that fact, or if the publicity attending his title and claim are such as to make them known to him, no express refusal to account, or denial of the right of the owner is necessary, because the title itself is supposed to be the cause of interversion, and this, when publicly asserted, is in itself a denial of the right under which the possession had commenced. In support of this view, Troplong cites the provisions of the French Code, by which a conveyance, emanating from a third person, and contradiction or a denial of right are made distinct and independent causes of interversion. Whereas, if contradiction in express terms had been necessary, that would have been declared to be the single cause of interversion.

Contradiction, or a refusal to account and a denial of the right of the person of whom possession had been held, is in itself a mode

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[1] Troplong, Tr. de la Prescription, No. 507.

in which the cause of possession may be changed. Such an interversion is not inconsistent with the rule above stated. The act is an extrinsic one, though emanating from the tenant, and by changing the relations of the parties creates a new and independent possession.

A possession thus commencing, though unjust and fraudulent, is recognized at the French law as the foundation of prescription *longissimi temporis*, or thirty years.

The appropriation of the entire profits of the land by the tenant, and the omission to pay or account, is not regarded as sufficient to work a change of the possession, and the words of D'Argentrée on this subject, are noticeable as in striking conformity with the doctrine, as stated by Lord Mansfield, as the rule in regard to ouster of one tenant in common by another.

"A simple refusal," he says, "does not constitute a ground for the commencement of prescription, but only when on the demand by the lessor, the tenant refuses to pay and asserts his right to possession, with acquiescence on the part of the owner. That is, without his commencing an action for thirty years."

The act of the tenant in asserting his right is regarded as constituting a change of possession. A mere cessation of payment produces no such effect as a refusal to pay, and a denial of right, because the cessation of payment may be ascribed rather to the forgetfulness of the owner, than to the act of the tenant in assertion of right.

The denial of the right of the owner, as well as the omission to pay, is necessary to a change of possession. A tenant, says Dunod, to do this, must, on the request of the owner, not merely omit to perform the duties required, he must say at the same time that he is not subject to them.[1]

In regard to the manner in which contradiction or the denial of the right of the owner may be made, the question has arisen, whether mere words were sufficient, unless in writing, and whether a claim in writing is in all cases necessary. Troplong states a

[1] Dunod, p. 37.

case where the acts of the tenant in possession are in themselves sufficient to constitute a claim of right, and a denial of the title of the owner, as follows:

If a person to whom permission has been accorded to feed his cattle by the owner, *a titre de precaire*, or as tenant at will, on uncultivated land, is at length informed by him that the permission is withdrawn, and notwithstanding the tenant afterwards persists in his occupation, and throws down the inclosures which the owner had erected for his exclusion; these are, in themselves, acts of possession, which, whilst they manifest a claim of right, involve a denial of the right of the owner. No such effect could be given to a merely oral communication, though these may be important as giving a character to acts which would otherwise be equivocal, such as a neglect or refusal to pay rent, or to account for the profits of land.

There is nothing in the rule in question which prevents a tenant, who is in possession under an executed contract, from acquiring a new possession by a conveyance from a third person, or from transferring the land to another, who may thereafter commence to hold adversely on a distinct possession.

The only principle which prevents a tenant from changing his possession and acquiring a right to land by prescription, is the effect of the contract which may exist between him and the party from whom he derives possession; and the only contract which can have that effect, is one which imposes a duty upon the tenant to be performed at a future time. Such a contract is inconsistent with a new and independent possession, and its effect is to prevent the tenant from acquiring title by prescription, or from commencing to prescribe while the contract is executory. The possession of a tenant for years, is always held under an executory contract. The contract on his part is to occupy the land as lessee during the continuance of the term, and at its end to deliver up the land to the owner. A tenant for years may acquire title from a third person to land of which he is in possession under a lease, and he may hold the land against his lessor by a title thus derived. But he will hold by title, and not by prescription, on a possession

commencing under his independent title. If he cannot sustain his claim of right by his new title, he cannot avail himself of an adverse possession, commencing at the time of the supposed conveyance. The contract controls his possession and renders it the possession of the owner.

Though the possession of a tenant for years cannot be changed, except by a paramount title derived from a third party, there is no principle which, on the conveyance by such a tenant of the land held by him for a term of years, prevents the purchaser from acquiring a new possession that will in time ripen into title.

The effect of the law in question was not to prevent the alienee of a tenant for years even from transferring such a possession as might be the foundation of prescription. Cujacius says, that if a tenant sells the farm which he holds as his own, though the sale is unlawful, by reason of the principle that a man may not change the cause of his possession, there is no doubt that a *bona fide* purchaser may prescribe for it, though he bought it of a vendor who was in bad faith, but the true owner may recover the land, if the purchaser has not acquired a right by prescription.[1]

The sale by a tenant for years, to be effectual, as changing the cause of possession, must be a transfer of property, and such as leaves no privity between the vendor and purchaser, otherwise it will operate only as an assignment of the tenant's interest, and the possession of the assignee will be that of the owner. Such is the doctrine of the French law,[2] and in this respect it is in perfect accordance with the common law, notwithstanding the peculiar effect which a feoffment has been supposed to have by the latter. A feoffment by a tenant for years, as by any other party in possession, operates to create a new possession in the feoffee, and as against third parties, this is its only effect. Such a possession may be adverse at the common law, and give effect to the Statute of Limitations, just as it would be a foundation for the prescription of thirty years by the civil law.

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[1] Cujacius Recit. Solemn, Sur le Code de acq. poss.

[2] Troplong, Tr. de la Prescr. No. 516.

As against the feoffor, a feoffment transferred the freehold; but as against the true owner, says Bracton,[1] there will be no freehold, except by long and peaceable seizin, and if immediately after the feoffment, the true owner can acquire seizin, he may hold all others out of possession. *Sed quoad verum dominum, nunquam erit liberum tenementum, nisi ex longa et paeifiea seisina et unde si incontinenti post tale feoffamentum posset verus dominus ponere se in seisina, omnes quoseunque tenere posset exelusas a possessioni.* And, although it was held by Lord Mansfield, that on a feoffment by a tenant for years, the lessor might elect to consider himself as not disseized, "and still distrain for the rent, or charge the person to whom it is paid as a receiver;"[2] some action by the lessor is necessary to manifest his election, for if the lessor permits the feoffee to remain in possession, he will, on the foundation of that possession, acquire a freehold. This is clear from what fell from his lordship, on the effect of fines with proclamations. By a fine with proclamations, the right of the true owner is extinguished, as he says, "for the sake of the bar." Fines are a species of statutes of limitation. It is sufficient for the operation of a fine that the feoffee of a tenant for years has a freehold as against the feoffor. Such a possession the feoffee has, under the Statute of Limitations.

The doctrine which was urged in that case, that the feoffee might be a good tenant to the precipe in a common recovery, was, that substantially the feoffee had an indefeasable right of property which was capable of being passed by a common recovery.

A tenant for term of years, who is bound by his contract to hold for the owner during the term, and at its end to deliver up possession, may as effectually change his cause of possession by a conveyance to a third person, as a tenant, who holds *ex preeario*, and whose liability results from his tenure alone. If the tenant for a term of years refuses to pay rent, and claims title, and expels the owner on his entry to claim performance of covenants, he is guilty of a forfeiture which may render him liable to an action

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[1] Bracton, Lib. 2, ch. 14.

[2] Taylor *vs.* Horde, 1 Burr. 60.

of ejectment, but he acquires no possession, because the lessor may waive the forfeiture and demand performance of the covenants by the lessee. Having this election to waive the forfeiture and insist upon performance, some act on his part is necessary to show his election to take advantage of the forfeiture, and the mere wrongful act of the tenant will not initiate a new possession in himself. Such is the necessary effect of the contract on the parties, and in this respect there is a distinction between the tenant and his feoffee, who is a disseizor, but only at the election of the lessor. In the one case the possession is controlled by a contract; in the other merely by tenure. The feoffee of a tenant for years is in privity of estate, and not in privity of contract.

Though, on an act of forfeiture by a tenant for years, the lessor has his election, and on his waiver of the forfeiture, the possession of the tenant will continue to be the possession of the lessor, it is quite otherwise with a tenant at will, and any act of forfeiture by such a tenant immediately puts an end to the tenancy of the latter.

Where a tenant for a term of years under a lease, delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with a view to enable him to set up his hostile title; this was held to be a forfeiture, of which the landlord might take advantage.[1]

In another case,[2] where a tenant for a definite term of years, on a demand of rent, orally refused to pay it, and asserted that the fee was in himself, the Court of King's Bench distinguished the case from the preceding one, on the ground that, in that case, the tenant had betrayed his landlord's interest by an act that might place him in a worse condition. They were of opinion that a lease, for a term of years, could not be forfeited by an oral disclaimer, although a tenancy from year to year might be thus determined. Lord Denman said, "When a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the title, is evidence of the determination of the will of both parties,

[1] Ellenbrock *vs.* Flynn, 1 Cr. Mees. & Ros. 137.

[2] Doe ex d. Graves *vs.* Walls, 10 Ad. & El. 427.

by which the duration of the tenancy, from its particular nature, was limited." His lordship thought the word "forfeiture" was improperly applied to such a case, as the supposed forfeiture absolutely put an end to the tenancy in such a case. Several cases were referred to on the argument, to show that the effect of a disclaimer was to create a forfeiture of the estate for a term of years; but they were all distinguished by the Court from the case in question; as of estates from year to year, and as such determinable at the will of the parties. Thus, it was held, that if a tenant hold from year to year, the landlord cannot maintain an ejectment without giving six months' previous notice, unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord; and in that case no notice was necessary.[1]

In another case, Lord Kenyon said, that if the tenant put his landlord at defiance, he might consider him either as a tenant or trespasser, and eject him without any notice to quit.[2]

When the tenant holds from year to year, the Court said, in a case where the claim of the tenant was not considered as necessarily inconsistent with the tenancy, "it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient." In such a case, the disavowal determines the estate.[3]

So it was held,[4] that a tenancy, from year to year, was determined by the tenant having written a letter to the reversioner's attorney, stating that his connection as a tenant had ceased for several years.

If a tenant at will disclaims that relation to his landlord, this is a renunciation by the party (of his interest and) of his character of tenant, either by setting up a title in another or by claiming a title

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[1] Throgmorton *vs.* Whelpdale, Bul. N. P. 96.

[2] Doe *vs.* Pasquali, Peake's N. P. 196.

[3] Doe d Gray *vs.* Stanion, 1 M. & W. 695.

[4] Doe d Grubb *vs.* Grubb, 10 B. & C. 816. See also Williams *vs.* Cooper, 1 Man. & Gran. R. 139.

in himself. By such an act the tenant does not change the cause of his possession, in the sense that he might otherwise presumptively hold under the agreement by which the tenancy was created, but he puts an end to his tenancy. He no longer holds permissively, but as a wrongdoer, and, if the owner permits him, thus claiming adversely, to continue in possession during the period of limitation, he is barred of his right.

In a case[1] where the widow of a testator, to whom he had devised the estate in question, and the younger of two sons joined in a deed of bargain and sale, conveying the estate in fee to H., without the privity of the eldest son and heir at law of the testator, and H. continued in undisturbed possession of the estate for twenty-two years, and died possessed, bequeathing it to his children; it was held that the possession of H. was not a disseizin to the eldest son and heir. "I think," said ABBOTT, C. J., "there is no ground for saying that the adverse possession of H. has operated as a disseizin (of the heir). H. did not take possession wrongfully; he only wrongfully continued possession. He came in under right and title, which remained good during the life-estate of the widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance (to the heir), who permitted him for a period to remain in possession." "I know of no authority," he proceeds, "which says that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment." But there was really in this case no adverse possession. The party entered rightfully under the conveyance from the tenant for life. Although he entered under a conveyance which purported to pass an estate in fee, his estate and his possession were, by operation of law, reduced to such as he might rightfully claim. His possession, after the death of the tenant for life, being qualified by construction of law, notwithstanding the claim under which he entered, continued subordinate to the right of the true owner, and therefore was not, properly

[1] Doe d. Souter *vs.* Hall, 2 Dowl. & Ry. 38.

speaking, adverse. There was no act of disclaimer by the tenant at sufferance after he became such, and, though he died in possession and bequeathed the land to his children, this was not such an act as might change the cause of his possession. This was the very case to which the rule of the civil law applied. There was no extrinsic act to change the cause of his possession, and his intention to hold aversely could not have effect consistently with the principle of law, which made him merely a tenant at sufferance. If there had been any act putting an end to his rightful possession, after the death of the tenant for life, this might have been sufficient to render him a disseizor.

The following case is an instance, where, as in a tenancy for a term of years, there could be no interversion, because the party in possession was prevented from changing the cause of his possession by the effect of a covenant which bound him in equity, and prevented him from setting up an adverse possession, and which would have prevented him from changing the cause of his possession by the operation of any extrinsic act.

In a case where certain devisees under a will, covenanted to carry the supposed intention of the testator into effect in favor of the heir, to what became a lapsed devise, by the death of a person to whom a certain share had been devised. Although they had the legal estate, and continued in possession more than twenty years, their possession was not adverse, and the Court were of opinion that they would have been guilty of a breach of trust if they had prevented the rents from being received for the party entitled.[1]

In this case, the possession was prevented from becoming adverse by the covenant which controlled its character, and even if the parties had claimed to hold discharged of the covenant, they would have been held liable in a court of equity, subject only to the rules of that court on a long-continued possession.

The doctrine of Lord Redesdale,[2] that the attornment of a tenant for a term of years to a stranger, by which the possession is betrayed, gives the stranger adverse possession against the lessor, is

[1] Coclough *vs.* Halse, 3 B. & C. 757.

[2] Hovenden *vs.* Lord Annesley, 2 Sch. & Lefr. 624.

not inconsistent with the rule which prevents the tenant from changing the qualities of his own possession. The attornment of the tenant is to be regarded, in such a case, as having the same effect as a wrongful conveyance by the tenant. The tenant does not, by such an act, change the cause of his own possession; but the design of his act is to make his own possession that of the stranger to whom he attorns.

Lord Redesdale observed, that the attornment of a tenant "will not affect the title of his lessor, so long as he has a right to consider the person holding the possession as his tenant. But as he has a right to punish the act of the tenant in disavowing the tenure, by proceeding to eject him, notwithstanding his lease, if he will not proceed for the forfeiture, he has no right to affect the rights of third persons, on the ground that the possession was betrayed; and there must be a limitation to that, as to every other demand." "The intention of the statute of limitations," said his lordship, "being to quiet the title of lands, it would be curious if a tenant for ninety-nine years, attorning to a person, insisting he was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of his original lessor for the term of ninety-nine years. That would, I think, be too strong to hold, on the ground of the possession being in the lessee after the tenure has been disavowed to the knowledge of the lessor. If the tenure has not been disavowed to the knowledge of the lessor," he said, "it was different," and referred to a case "where there had been a lease for sixty years, and no rent paid for many years, and at the expiration of the lease it was insisted, that as no rent had been paid the tenant could not be evicted by the person entitled to the reversion; but it was held, that as the tenant entered originally under the lease, and his possession was lawful as against his lessor, who was entitled to all his remedies for the rent, there was no disavowal of the tenure. But that if he had attorned, with the knowledge of his lessor, to another, so that there was a disavowal of tenure for that time, he was of opinion that the same doctrine could not be sustained. If in the case referred to by his lordship, there had been a disavowal of tenure during the whole time of the lease,

this would not have affected the right of the reversioner to enter at the end of the term for years, for if such a disavowal is to be regarded as a forfeiture, it might be waived without impairing the right as between the parties.

Lord Redesdale, in this case, contemplated the attornment of the tenant as an act designed to transfer the possession to a stranger, and as such depending for its efficacy upon knowledge of the attornment being brought home to the lessor.

There was nothing in the terms of the contract between the lessor and the lessee, which could prevent the attornment of the tenant from giving the stranger possession by the ministry of the lessee. The attornment was to be regarded as having the same effect as if the tenant had abandoned possession to a hostile claimant. It thereupon became necessary for the lessor to enter upon his tenant for a forfeiture, for the same reason that his entry upon a stranger in actual possession would be necessary. No act of the tenant could have any effect upon the possession, so as to change the relations of the parties, as between themselves, because that was controlled by an agreement which had not only a present but a prospective operation upon his possession. The only question in the case decided by Lord Redesdale, related to the effect of the attornment. If that was sufficient to constitute the party, to whom it was made, in possession, that possession being hostile, was capable, by length of time, of ripening into title.

The question was considered and discussed in a leading case on this subject, by the Supreme Court of the United States.[1] In that case, the tenant, by agreement with the owner of the land, entered upon the premises as an agent, and with authority to sue trespassers, and protect the possession of the owner. He thus became a tenant at will. Afterwards, the tenant claimed to hold the land by an adverse title, and the owner had notice of the adverse claim. The tenant, and those claiming under him, continued in possession more than thirty years. The Court held, that the disclaimer determined the tenancy as to the owner, and that from the time it was

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[1] Williston *vs.* Watkins, 3 Peters R. 43.

made, he had a right to eject him as a trespasser. This decision was in perfect conformity with the principle above stated; but the learned judge who delivered the opinion of the Court, considered the case the same as if the tenancy had been for a term of years, and seemed to suppose that the disclaimer of such a tenant would necessarily work a forfeiture which must put an end to his estate, and make his subsequent possession adverse.

After considering the facts which constitute a disclaimer with the knowledge of the owner, and its effect, BALDWIN, J., said: "Having thus a right to consider the lessee as a wrongdoer holding adversely, we think that, under the circumstances of the case, the lessor was bound so to do. It would be an anomalous possession which, as to the rights of one party, was adverse, and as to the other, fiduciary. If after a disclaimer with the knowledge of the landlord, and attornment to a third person, or setting up a title in himself, the tenant forfeits his possession and all the benefits of the lease, he ought to be entitled to such as result from his known adverse possession. No injury can be done to the landlord unless by his own laches. If he sues within the period of the act of limitations he must recover; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and lapse of time. As to the assertion of his claim, the possession is as adverse and as open to his action as one acquired originally by wrong; and we cannot assent to the proposition, that the possession shall assume such a character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer and adverse claim, so as to protect himself during the unexpired term of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right."

Now, if it were true that an oral disclaimer would be sufficient to work a forfeiture of a definite term for years, it is plain that the lessor might treat the disclaimer as a forfeiture or not, at his election; and for the obvious reason, that the relation between the parties is created by a contract executed only in part, and by which

the tenant binds himself to hold as lessee during the whole term, and at its determination to deliver up the land to the lessor. Of this obligation, the tenant cannot discharge himself by his own wrong, although the wrong may, by working a forfeiture, give the lessor another remedy, which is independent of the contract. If, in every case of forfeiture, the lessor were bound to enter, the tenant would be furnished with an easy discharge from a contract on which he had received a partial benefit, and the onerous duties of which remained to be performed. There is not, as is suggested, anything anomalous in the character of the possession after an act of forfeiture, which does not necessarily put an end to the estate. The possession is not, thereafter, as to the rights of "one party adverse, and as to the other, fiduciary." If the lessor enters for a forfeiture, the possession of the tenant is at an end; if he elects to waive the forfeiture, the possession and the relative rights of the parties are the same as before the act was committed.

But an oral disclaimer would not work a forfeiture of an estate for years and in the case in question the disclaimer had the effect of determining the tenancy, because it depended upon the will of both parties, and could not subsist after a disclaimer by one of them.[1]

S. F. D.

(*To be continued hereafter.*)

RECENT AMERICAN DECISIONS.

In the Court of Appeals of the State of New York.

THE PEOPLE, EX REL., THE BANK OF THE COMMONWEALTH, *vs.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.

1. Stock in the public debt of the United States, whether owned by individuals or by corporations, is taxable under the laws of the State.
2. The taxation, by the State, of property invested in a loan to the Federal Government, is not forbidden by the Constitution of the United States, where no unfriendly discrimination to the United States, as borrowers, is applied by the

[1] See Graves *vs.* Wells, 10 Ad. & El. 427.

State law, and property in its stock is subjected to no greater burdens than property in general.

3. Whether Congress, for the purpose of giving effect to its powers to borrow money, and of aiding the public credit, may constitutionally enact that a stock to be issued by the Federal Government shall be exempt from taxation, *quære.*

4. The cases of *McCullough* vs. *Maryland*, 4 Wheat. 116; *Osborn* vs. *United States Bank*, 9 Wheat. 738; and *Weston* vs. *The City of Charleston*, 2 Pet., examined and distinguished.

Appeal from a judgment of the Supreme Court. That Court, upon the application of the Bank of the Commonwealth, awarded a *certiorari* to the Commissioners of Assessments and Taxes of the city and county of New York, for the purpose of reviewing their proceedings in assessing that corporation, in the year 1859. It appeared from the admissions in the return of the commissioners, that the Bank of the Commonwealth was a banking association organized under the general banking law, with a capital actually paid in of $750,000, out of which it had paid $188,834 84 for real estate, consisting of its banking-house, leaving $561,165 16, of which $103,000 was invested in the stock of the public debt of the United States, of the loan of 1858, which was actually owned by the corporation at the time the assessment was made. The bank claimed, before the commissioners, that the stocks of the United States were exempt from taxation under the Federal Constitution, but that Board held otherwise, and assessed the corporation for personal estate for the whole balance of capital after deducting the sum paid for real estate, and it was taxed thereon. The Supreme Court held that the stocks referred to were not exempt from taxation in this case, and affirmed the assessment; upon which the present appeal was brought by the Bank.

Alexander W. Bradford, for the appellants.

Greene C. Bronson, for the respondents.

Denio, J., (after discussing certain questions of a statutory nature, and of local interest,) proceeded as follows:—

The question then arises, whether the public debt of the United States is exempt, by the Federal Constitution, from taxation under

the general laws for the assessment and collection of taxes which are in force in this State. It is essential, in the outset, to have a clear perception of the principles upon which taxes are imposed under our State laws. We do not select particular subjects of taxation, and, upon motives of policy, burden these with the public contributions, or a disproportionate part of them, in exoneration of the other property of the citizen. The rule, on the contrary, is to tax every person for all the property he possesses. This doctrine is announced at the commencement of the chapter of the Revised Statutes, respecting taxation: "All lands, and all personal estate, within this State, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." 1 R. S., 387. The exceptions are inconsiderable, and only tend to prove the universality of the principle. And there is no artificial rule of valuation, by means of which a discrimination can be made in favor of or against any particular species of property. The real estate is to be assessed at its full and true value, and that at which the assessors would appraise it in payment of a just debt due from a solvent debtor; and the personal estate is to be set down at its full and true value, over and above the amount of debts due from the person assessed. Laws of 1851, ch. 176, § 8. If, therefore, the stock in question is assessable at all, it is to be included in the mass of the tax-payer's property, and is to be set down at what it is really worth, in the same manner as every other item of his taxable property. It is not taxable by name, and there is no discrimination in favor of or against it, but the bond or script which furnishes the evidence of the title is regarded like any other security for money.

Having premised thus much, the question recurs, whether there is anything in the Constitution of the United States which, by a fair interpretation, forbids the States, under their tax laws, from including in the aggregate valuation of the tax-payer's property, in respect to which he is to be taxed, money which he has lent to the Federal Government, for which he holds its evidence of indebtedness. It is the Constitution alone which is to be looked to, for Congress has never passed any statute on the subject. That body

has from time to time authorized the executive department to borrow money, to fix the rate of interest to be paid, and to pledge the public credit for its payment; but it has not undertaken to restrain or limit the taxing powers of the State Governments in respect to the money lent or the script or securities to be issued upon such loans. It has said nothing on that subject. If there is any such restraint or limitation, it exists in the Constitution itself. Among the attributes conferred upon Congress by that instrument, is the power "to borrow money on the credit of the United States." Art. 1, § 8. Then the Constitution declares that itself, and the laws made pursuant to it, and the public treaties, shall be the supreme law of the land, and paramount to the State Constitutions and laws. Art. 6, ¶ 2. It may be safely admitted that any Act of a State Legislature, forbidding, or placing any substantial obstacles in the way of negotiating, Federal loans from the citizens of such State, would conflict with the Constitution. As the constitutional power to borrow money does not declare that it shall be procured within the Union, or from citizens of the United States, there is, perhaps, no corresponding duty on their part to lend. Nor was it intended that any such duty should be imposed. No enabling power in respect to the lender was required. Nothing was necessary but that the political corporation, which it was proposed to establish, should be endowed with the faculty of borrowing on the public credit. As to the rest, the money markets of the world were looked to for furnishing the other parties to the contract of lending. An unfriendly act of legislation, which should exclude the Federal Government from resorting to the money markets of a particular State for loans, though it might not seriously affect the exercise of the borrowing power elsewhere, would be so obviously hostile to the operations of the Government, that I am confident it could not be sustained; and such is, no doubt, the effect of the judgment of the Supreme Court of the United States in the case to be presently mentioned. But our laws for the assessment and collection of taxes, supposing them to include shares in the public debt of the United States along with other personal property of the citizen, leave the Federal Government in precisely the same condi-

tion with any other borrower. It was the practice of independent governments, as well as of municipalities and trading corporations, anterior to the Constitution, as it is now, to borrow money in their own or in foreign States. The citizens of the several States, though not at that time lenders in such loans to any considerable extent, were capable of becoming such. They might lend money to the Federal Government, to the State Governments, to foreign nations, and to individuals. As to none of these, except the United States, is there any pretence that the State Legislature was obliged to waive the right of taxing the lender for his property in the obligation taken to secure the repayment of the money loaned. In like manner, the Government of the United States possesses the same power to borrow in the marts of the old world as of its own citizens. But the foreign lender would of course be subject to the laws, as to taxation, prevailing in the country of his domicil. The claim, therefore, which is now interposed on behalf of the Federal Government, is of a right to present itself as a borrower in the money markets of this State, in a different and far more favorable position than our own State Government occupies when it has occasion for a loan, and, of course, than that which other borrowers, public, corporate or private, foreign or domestic, can pretend to. It is, moreover, the claim of a right to impose upon the Legislature of the State disabilities in respect to the taxation of moneys loaned to the United States, which there would be no pretence for challenging against any foreign country to which they might resort for the negotiation of loans. The claim is not supported by any specific language in the Constitution pointing to such consequences, nor, as we have said, by the terms of any statute, but simply upon the power to borrow money upon the public credit conferred by the Constitution. Such a power, conferred by such general language, seems to us fully satisfied, so far as the State Governments are concerned, when no unfriendly discrimination towards the United States, as borrowers, is applied by the State laws; when the General Government is admitted to negotiate upon the same terms as other borrowers, public or private, with such of our citizens as may choose to become lenders of money, and when they are placed on

the same precise footing, in all respects, as all other borrowers, *prima facie*, the provision simply confers upon the Government a capacity to become parties as borrowers upon the public credit, to a contract of loan. If it had been intended, beyond this, to give them, in the States of the Union, an advantage over all other borrowers, it is certainly remarkable that more explicit language was not used. We give no opinion on the question, whether Congress could enact a law by which the lenders of money to the Government should enjoy the advantage of exemption from State taxation in respect to such loans. Events may occur—perhaps they have already occurred —when the preservation of the Constitution and the continuance of the Union may depend upon the ability of the Government to obtain a seasonable supply of funds, and we would not unnecessarily interpose a *dictum* which would appear to circumscribe any powers which it may possess. But in the absence of any such statute, and resting upon the general grant of power contained in the Constitution, we are of opinion that the claim to be exempt from taxation cannot be allowed to prevail.

The argument in favor of exempting the holders of Federal indebtedness from State taxation is principally based upon the consideration of the paramount authority of the Federal Constitution over the Constitutions and laws of the States. The pre-eminence of the former is beyond dispute. It is inherent in the nature of an imperial Government, instituted to watch over and protect the interests and welfare of particular local governments. The powers conferred for such purposes must necessarily be absolute and uncontrollable. All general reasoning upon the subject is, however, rendered unnecessary by the explicit provision referred to in the Constitution itself. But before the State enactments can be called upon to yield to Federal institutions, it must satisfactorily appear that there is a conflict between them. Undoubtedly the Federal Government could enter the money market with greater advantage if it could promise to the lenders an immunity against State taxation in respect to the money to be loaned. But, as no other borrower can offer any such advantage, and as without it loans have always been sought and obtained, and no doubt will continue to be,

the withholding of it cannot be justly considered a restraint upon the borrowing power. What is asked is not in truth the removal of an obstacle, but a positive bounty to the lenders of money to the Government. It is claimed that an advantage should be conceded to them which is rightfully withheld from every other lender. Hence, it appears to us that there is no hostility between the laws of this State, which attempt to tax its citizens, among the mass of their property, for all their money loaned, without any exception of such as may have been lent to the Federal Government, and the power to borrow money which the Constitution has conferred upon that Government. Both provisions can stand perfectly well together, and there is not really any conflict between them.

The power of taxation is as essential to the existence of the State Governments as that of borrowing is to the Nation. Both undeniably exist. The right of the several States to include the public creditors, in respect to the money owing to them by the Nation, among the tax-payers, may be one of great importance. The amount of property existing in that form is now very large, and public measures transpiring at this moment show that it is to be greatly increased. A judgment which should exonerate that mass of wealth from liability to contribute to the expenses of the State Governments, might lead to considerable embarrassment. Besides, it would create a class of favored citizens, who could put the tax-gatherers at defiance, while the mass of the community would be left to defray the whole expense of the State and local administrations. This, it is true, should not prevent the rendering of such a judgment, if the true interpretation of the Constitution requires it. But if it shall appear that the power of the Federal Government to contract loans cannot be materially impaired by holding the public creditor liable to pay his share of the public burdens; while the administration of the fiscal affairs of the States will be seriously embarrassed by withdrawing a large mass of the property of the citizens from liability to taxation, those circumstances (which are now actually transpiring) would seem to call for a reconciling construction which will allow both the great political powers to exist without either being essentially impaired. The necessity of such a

construction of the Federal Constitution was foreseen while the draft of that instrument was under discussion, prior to its ratification by the State Conventions. One of the most indispensable powers conferred upon Congress was that of laying and collecting "taxes, duties, imposts, and excises." But as the great bulk of the expenses of public administration was left to be defrayed by the States and their local divisions, the National Government being limited to external relations and a few subjects of internal government, it was essential that the right of taxation should continue to be enjoyed by the States, to enable them to meet these necessary expenses. They were, however, prohibited from laying duties upon imports or exports, or upon tonnage, without the consent of Congress; but as to all other subjects of taxation, embracing the real and personal estates of the citizens, the Constitution was silent as to the rights of the States. A rigid construction of the provision making the Federal laws, enacted pursuant to the Constitution, supreme over those of the States, would forbid the latter from exercising a concurrent right of taxation over subjects as to which the taxing power of Congress should be applied. Suppose, for instance, that the General Government should lay a land tax, could a State Government do the same thing while the Federal law remained in force? True, if the State tax was of moderate amount, the landowner would be able to pay both, and thus no embarrassment would arise to the General Government. But it might be said, if you admit the principle of concurrent taxation by the States, it will not be possible so to limit the amount as to prevent inconvenience in the exercise of the Federal power; and the Federal laws are declared to be paramount to those of the States. Hence, it was apprehended that the taxing power of the States might be held to be taken away by the like power which the Constitution conferred upon Congress. This objection was treated of in the 32d and 33d Letters of Publius, written by Mr. Hamilton. He maintained, by a convincing train of reasoning, that the taxing power of Congress was not, in respect to any subjects, except imposts, exports and tonnage, exclusive of or superior to that of the States, but that they were concurrent. "The necessity," he said, "of a concurrent

jurisdiction in certain cases, results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the Articles of the proposed Constitution. (Federalist, No. 32.) He insisted that it was not a case of repugnancy in that sense which would be requisite to work an exclusion of the States. While he admitted that it was possible that a State might tax a particular kind of property in a manner which would render it inexpedient that a further tax should be laid on the same subject by the Union, he still held that it would not imply a constitutional inability to lay such further tax. He conceded that the particular policy of the National and State systems might now and then fail to coincide exactly, and that forbearance might be required. "It is not, however," he added, "a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty." (Id.) And he concludes, as the result of the whole argument, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent they might stand in need of, by every kind of taxation except duties on imports, exports and tonnage. (Federalist, No. 33.)

The repugnancy between the concurrent powers of taxation residing in the General and in the State Governments, seems equally as striking as that which is alleged to exist between the Federal power of borrowing money and the State power of taxing all the property of the citizen, including his money invested in loans to the Government. It may be said that the latter power can be exerted to an extent which would impair the efficiency of the other. But such an effect, if produced, would be incidental and indirect. State taxation might, it is true, supposing a very extreme case, be carried to such an extent that nothing would be left to lend to the Nation. But if no unfavorable discrimination is made as to money invested in Federal loans, it cannot be alleged that such excessive

taxation would be any more hostile to the borrowing power of the General Government than any other species of State misgovernment; and it can scarcely be pretended that the Federal institutions are supreme in such an absolute sense that any State power which, by a possible abuse, may impair the efficiency of some national attribute, is necessarily abrogated. Indeed, the complaint on the part of those who oppose the claim of the State is, as has been already remarked, not so much that our State tax law conflicts with the Federal power to borrow money, as that it does not concede to the Union superior rights in our money market over those enjoyed by any other class of borrowers.

It remains to notice the judgments of the Supreme Court of the United States which, it is argued, have laid down the principles which lead to the entire exemption of Federal stock from State taxation. In *McCullough* vs. *The State of Maryland*, 4 Wheat., 116, the question, in substance, was, whether the issues of bank notes by the Maryland branch of the Bank of the United States could be subjected to a stamp tax under the laws of Maryland. That State had passed an act requiring banks transacting their business in that State, but which were not chartered by the State legislature, to issue their notes on stamped paper on which a certain duty was to be paid, but for which any bank might commute by paying a tax of fifteen thousand dollars a year in advance. A heavy penalty was provided against any bank officer who should issue unstamped notes; and the action was brought against McCullough, the cashier of the Baltimore branch of the Bank of the United States, to recover penalties for a violation of the act. The constitutional validity of the act of Congress incorporating the bank, was largely discussed, and was passed upon by the court; and its constitutionality was sustained. The bank was considered a convenient, useful, and essential instrument of the government in the prosecution of its fiscal operations, and its establishment by Congress was held to be the constitutional exercise of the power "to make all laws which should be necessary or proper to carry into execution" the authority granted to the General Government. Then the question as to the power of the States to tax the bank or its branches was con-

sidered and determined. But when it had been once settled that the bank was a constitutional agency and instrument for the transaction of the moneyed operations of the government, it followed necessarily, as it seems to us, that it could no more be taxed by State authority than the treasury department, the mint, the post-office, or the army or navy; and it was upon this ground that the Maryland statute was held to be unconstitutional. The State power of taxation, which was admitted to embrace everything which existed by its own authority, or which was introduced by its permission, was held not to "extend to those *means* which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." (See opinion of Chief Justice MARSHALL, p. 429.) The same question again arose in *Osborn* vs. *The United States Bank*, 9 Wheat., 738, which was an action brought to test the validity of a statute of the State of Ohio, by which an annual tax of $50,000 was imposed upon the Ohio branch of the Bank of the United States, to be collected by means of a warrant to be issued by the auditor of the State. The question was again elaborately argued and considered by the court, and the exemption of the bank and its branches again declared, on the ground that the institution was an instrument, or, as it was several times called in the opinion of the court, a *machine* for carrying on the moneyed operations of the National Government. In the State laws under consideration in both these cases, the branches of the bank were taxed, not in respect to their property, *eo nomine*, as banks, and because they were banks. Perhaps it may be inferred from the reasoning of the court, that they would have been held equally exempt from taxation, if the tax had been laid on the corporation in respect to its capital or personal property. No idea, however, was entertained that the money which was invested in the stock of the bank was thereby withdrawn from State taxation. Indeed, such a conclusion was explicitly disavowed in the opinion of the Chief Justice in the first mentioned case. "This opinion," he says, "does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid on the real property of the bank, in common with the other real property

within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other propety of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional:" 4 Wheat., 436.

Enough has been said to show that these cases bear no analogy to the one before us. But, in *Weston* vs. *The City Council of Charleston*, 2 Pet., 449, *anno* 1829, the subject of State taxation of the debt of the United States, in the hands of an individual, came directly before the Federal Supreme Court, and the judgment was against the right to lay the tax. The case differs from the present only in the circumstance that the tax was not laid upon the bulk of the property of the citizens, but only upon certain specified securities, and that it was imposed upon the United States stock *eo nomine*. It was imposed by the municipality of the city of Charleston, South Carolina, under authority derived from the legislature of that State. It was laid, as the report states, "upon all personal estate, consisting of bonds, notes, insurance stock, *six and seven per cent. stock of the United States*, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded debt of this State, and stock in the incorporated banks of this State and the United States Bank, excepted"); and the amount of the tax was "twenty-five cents upon every hundred dollars." Real estate does not appear to have been embraced. Neither were goods or personal chattels of any kind, or slaves, or the stock of the General Government paying less than six per cent., or simple contract debts due to the tax-payer, or individual obligions on which, for any reason, interest should not be paid within the year; and the public debt of the State, the stock of all the State banks, and that of the Bank of the United States, were in terms excepted. It was not, therefore, a tax upon the property of the tax-payer generally; but particular kinds of property were selected from the mass, embracing, in all probability, far less than a moiety of the private property of the city, and the tax was

assessed upon that, to the exoneration of all the residue. And the tax imposed was not limited to the aggregate of the public charges for the year; but an arbitrary sum was exacted of twenty-five cents on each hundred dollars, whether that should be more or less than the exigencies of the city government should call for. The different system upon which the taxes of this State are assessed, has been already shown. Under the ordinance of the city of Charleston, the United States would not enter the money market of that city upon an equal footing with all other borrowers. The State of South Carolina, for instance, could assure those who should lend it money that they should be exempt from city taxation, and the same advantage would be extended to capitalists who were minded to invest in the stock of the State banks or in that of the Bank of the United States. So, money or property invested in mercantile, manufacturing or other business, so long as it does not assume the form of interest paying obligations, would be exempt from taxation. The law, or ordinance, discriminated, in respect to taxation, adversely to certain classes of securities, including the scrip of the public debt of the United States. The effect upon the government was nearly the same as though the funded debt of the Union had been singled out as the subject of taxation. Including other securities, the whole constituting only a part of the property of the citizens which might be subjected to taxation, does not relieve the law from the charge of visiting the whole of the public burdens upon particular kinds of property in exoneration of the mass of it. Such a measure might arise either out of motives of hostility to the property charged or the business out of which it originated, or from a motive of hostility to the interests taxed, or a desire to favor the owners of the residue at the expense of such interests. In either case it might easily be carried to the extent of seriously discouraging or entirely destroying the interests discriminated against. But where all the private property of the community is taxed ratably, no such effect could follow, and under such a system, moreover, there is but little danger of oppressive taxation. In levying such a tax, the legislature acts equally upon all its constituents. In our opinion, the judgment last referred to is distinguishable in principle from the case we are con-

sidering, in the point to which we have now referred. If the Federal stock can be taxed separately and specifically at any amount which a State legislature, or a municipality to which its power has been delegated, shall see fit; the government in seeking to obtain money on loan may be effectually driven out of the markets of such State. But such a consequence could never happen under the existing tax law of this State. The idea that the legislature would dare, or would be permitted, by excessive taxation, to destroy or seriously embarrass the interests of all the property holders of the State, is not to be supposed.

Intending as we do to follow implicitly the matured judgments of the Supreme Court of the United States, pronounced in cases arising under the Federal Constitution and Laws, we yet conceive ourselves at liberty to receive or to reject any *dicta* which were not called for by the facts of the case adjudged, according to our own sense of their conformity or want of conformity to law. We are aware that some portion of the reasoning of the opinion of the court, prepared by the venerable Chief Justice in the case referred to, would embrace the present controversy, though other parts of it we think refer to the tax under consideration as laid specifically upon Federal stock; and that in the dissenting opinion of Mr. Justice Thompson, the majority of the court are understood to assume the broad ground that the stock of the United States is not taxable in any shape or manner whatever. But we think it was not legally possible for the court to decide, that such stock could not be taxed along with the mass of the tax-payer's property, under a taxing system like the one prevailing in this State, while determining a controversy in which the actual facts presented by the litigation disclosed, a case of taxation discriminating adversely to such stock. Such a question as is claimed to have been decided, was not discussed by the counsel on the argument. The counsel for the plaintiff in error, who was the party seeking to avoid the tax, did not contend that the stock would be exempt under a system which should embrace all property, or even all public funds. He said: "The ordinance does not impose a tax upon all public funds, but *specifically* on the six and seven per cent. stock of the United

States. Thus, there are selected as the particular objects of taxation, these debts of the Government of the United States." And the counsel laid before the court as a part of their argument the opinion of three of the judges of the Constitutional Court of South Carolina, who, holding that the stock was not taxable, dissented from the opinion of the majority. But they placed their dissent on the ground that the tax was upon the stock, *eo nomine*, and was thus a burden imposed upon the credit of the United States.

We differ, with natural reluctance, from even an *obiter dictum* of so great and wise a judge as Chief Justice Marshall, especially when apparently concurred in by a majority of the judges of the national tribunal of last resort; but we are happy to know that if we have fallen into an error, it can readily be corrected. If that eminent court shall, upon a reconsideration of the question, adjudge that stocks of this description are universally exempt from taxation, we shall cheerfully conform our judgments to such decision; but until such review shall be had, we think it safer to follow the direction of our own convictions. The question is confessedly one of very great importance. If we determine it in favor of the tax-payers, the public authorities cannot appeal to the Federal court, as it is only in the case of a right, claimed under the Constitution or laws of the United States, which has been denied by a State court, that the National tribunal has jurisdiction, whereas the judgment, which we actually render, can be carried immediately to the court of the last resort.

The judgment of the Supreme Court is affirmed.

MASON, J., also delivered an opinion for affirmance; SELDEN, LOTT, JAMES, and HOYT, JJ., concurred, without, however, passing upon the questions first discussed, as to the construction of our statutes, as to which four of the judges were understood to express a different opinion from that stated by Judge Denio.

The question raised in this case is for the first time distinctly decided. As an elaborate discussion by a learned and able Court, it furnishes material for the final adjudication of the matter by the Supreme Court of the United States. The recent case of Almy *vs.* State of California, 24 How. U. S. 169, (1860,) may have some bearing upon the question. A tax upon a *bill of lading* of gold exported, was held to be in reality a tax upon *the gold itself*. Says the Court in

substance, Ch. J. TANEY delivering the opinion, "A bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. Such instruments are hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cotton, when exported, for no one would put his property in the hands of a ship-master *without taking written evidence of its receipt* on board the vessel, *and of the purposes for which it is placed in his hands.*" In like manner, it may be urged, that government stocks and securities of the same import are always associated with the borrowing of money. No one would think of lending to the government, without the evidence of the loan which they furnish, and the convenient means of transfer which they supply. They are the *instruments* of borrowing, as bills of lading are the instruments of commerce. They are not only evidence of the indebtedness of the government to the lender, but they also supply the means by which that indebtedness can be contracted. If this view be correct, the fact that they were taxed by a State in common with other subjects, would not be decisive, for it is conceived that the *instruments* or machinery by which the general government carries on its constitutional operations, cannot be taxed by the States at all. The tax becomes, in substance, an interference with the exercise of the power of borrowing, itself.

In the Supreme Judicial Court of New Hampshire, August, 1861.

GEORGE W. PINKERTON *vs.* MANCHESTER AND LAWRENCE RAILROAD.[1]

1. Upon a pledge of stock in a railroad corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor, the pledgee must be clothed with all the usual muniments and *indicia* of ownership.
2. Under the laws of New Hampshire, a record of the ownership of shares must be kept by such corporations in this State, and by proper certifying officers resident herein.
3. On the transfer of stock the delivery will not be complete, until an entry of such transfer is made upon the stock record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and if unexplained, conclusive evidence of a secret trust, and therefore as matter of law fraudulent and void as to creditors. Where the transfer was made at a distance from the office, and the old certificates surrendered, and new ones given by a transfer agent appointed for that purpose, and residing in a neighboring State,

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[1] We are indebted to the courtesy of Mr. Justice Bellows for the opinion of the Court in this important case at so early a date after its delivery, for which he will be pleased to accept our most sincere thanks.—EDS. AM. L. REG.

proof that the proper evidence of such transfer was sent to the keeper of the stock record to be entered by the earliest mail communication, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and such transfer would be good against the creditor.

4. But where the pledge was made in Boston on the eighth day of July by a delivery over of the certificates, and nothing more done until the third day of the following August, and then the old certificates surrendered to the transfer agent there, and new ones received from him, and notice given by the first mail to the office at Manchester in this State: *It was held*, that as against an attachment made between the obtaining the new certificates and the notice at the office, the possession was not seasonably taken, and the transfer was therefore not valid.

5. Where, upon a sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand, with interest, and not the value at the time of trial or at any intermediate period.

Perley, Clark and Smith, for plaintiff.

W. C. and S. G. Clark, for defendant.

The opinion of the Court was delivered by

BELLOWS, J.—This is an action of assumpsit for refusing on demand, to give to the plaintiff a certificate of twenty-nine shares of the stock of the Manchester and Lawrence Railroad, and to pay him the dividends on the same stock.

It appeared that on the 8th day of July, 1854, one Holbrook owned ninety-six shares of that stock, and then transferred them by indorsement on the back of the certificates to the Granite Bank, Boston, of which he was President, as collateral security for his debts to that bank, amounting to over $100,000.00.

The certificates were at the same time delivered to the bank, where they remained without any entry of a transfer on the books of the railroad until the third day of the ensuing August, at a little past 2 o'clock P. M., when they were delivered by Holbrook to Moses J. Mandell, who entered the transfer in a book kept by him as transfer agent, at the office of Brown & Sons, in Boston, of which firm said Mandell was a member, and the certificates were surrendered by the bank to Mandell, and new ones issued by him for the same stock to the bank, he being furnished with blank certificates signed by the President and Treasurer for such pur-

poses. And by the earliest conveyance Mandell sent the old certificates, with notice of the transfer, to the office of the railroad at Manchester, which was received there at about eight o'clock in the afternoon of the same third day of August, and afterwards, in September, 1857, a corresponding entry of the transfer was made in the proper books at that office, as of the date of Sept., 1857.

It also appeared that the Treasurer of the railroad corporation, by vote, in June, 1852, was authorized to appoint a transfer agent in Boston, and that on said third day of August, and for some time before, said Mandell was acting as such transfer agent, and was furnished by the corporation with books to be used for that purpose, and with blank certificates signed by the proper officers of the corporation, and to be filled up and used by him in the course of his business as such agent; and it appeared also that what said Mandell did in issuing new certificates and sending notice to the office at Manchester, and entering the transfer on the books kept by him, was in the regular course of his business as such transfer agent, and that the plaintiff was aware of this course of business, and that said Mandell acted as such agent.

It further appeared, that on said third day of August, the plaintiff, a little before noon, went to Mandell's said place of business, to ascertain if Holbrook had transferred his stock, and finding that no transfer had been entered there, he went to Manchester, procured a writ upon a note he held against said Holbrook, and attached his stock in said corporation at eight minutes before five o'clock in the afternoon of said August 3d, and without any knowledge in him or the officer serving the writ, of any assignment of the stock.

That judgment was obtained in that suit, and twenty-nine shares of that stock sold to the plaintiff to satisfy it, on the 12th day of July, 1856; the lien acquired by the original attachment having been preserved, and the question is, whether the assignment to the Granite Bank was good against the attaching creditor.

To the regularity of the proceedings upon the attachment and sale upon execution, there is no exception, nor is there any objection to the existence of a *bona fide* debt to the Granite Bank; but

the only question is, whether the transfer was so far completed as to be valid against an attaching creditor.

There is nothing either in the charter or by-laws of the corporation, to prescribe or regulate the mode of making a transfer, but it is contended by the plaintiff's counsel, that until it is entered or recorded in the stock books of the corporation kept in this State, the transfer is not valid as against an attaching creditor. And the argument is put upon two grounds:

I. That by force of the various statutes upon the subject of the evidence of ownership of stock, and the keeping of the records, and the residence of the officers and their duties, such entry or record is necessary to a valid transfer.

II. That to constitute a complete delivery of the stock, such entry and record are necessary, as the natural and recognized *indicia* of ownership, and that without such entry the stock must be deemed to be still in possession of the assignor, which implies a secret trust, and is, therefore, in the judgment of the law, fraudulent and void as to creditors.

In regard to the second ground taken by the plaintiff's counsel—namely, that without such entry or record the possession of the stock cannot be deemed to have been changed—it is alleged in answer by the counsel for the defendant, that the entry or record in the books of the transfer agency was sufficient, and the same as if entered in the books at Manchester; and it is also suggested that all the possession was given that the nature of the property was capable of, as in case of that of sale of goods at sea.

And it appears that, by the earliest conveyance after the old certificates were surrendered, the new one was sent to the office at Manchester, with notice of the transfer.

Had this been done immediately upon the pledge and transfer recorded in the books at Manchester, a question might have arisen whether the possession was not protected without unreasonable delay, and so as to prevail against an intervening attachment, as in *Ricker* vs. *Cross*, 5 N. H. 570, and in the case of the sale of a ship in a distant port, as in *Putnam* vs. *Dutch*, 8 Mass. 287; *Portland Bank* vs. *Stacy*, 4 Mass. 661; or abroad or at sea, as in the cases

cited in *Ricker* vs. *Cross*, and as in *Cunard* vs. *Atlantic Ins. Co.*, 1 Peters, 384, 449, and *Jay* vs. *Sears*, 9 Pick. 4, and *Bufferton et al.* vs. *Curtis et al.*, 15 Mass. 528, and 1 Smith's Leading Cases, 6, 7.

In this class of cases it may be said that the want of delivery at the time is explained within the principle of *Coburn* vs. *Pickering*, 3 N. H. 415, upon the ground that such delivery was impossible, and therefore the presumption of fraud is repelled. See *Gardner* vs. *Howland*, 2 Pick. 599, and *Peters* vs. *Ballister*, 3 Pick. 495. On this ground a similar doctrine has been held in the case of the sale of a slave too sick to be moved at the moment.

But in the case before us this question does not arise, because the assignment was made on the eighth day of July, and nothing sent to the office until the third day of August, and this we think could not be regarded as using due diligence to perfect the assignment, if such entry and record was necessary. Nor do we think that books of the transfer agent in Boston can be regarded as the records or accounts of the shares or interests of the corporators contemplated by the several statutes, in providing for the means of taxing the several shareholders, enforcing their private liability, or for giving creditors the necessary information to enable them to attach or levy upon the stock. On the contrary, we think it quite clear that the law contemplates the keeping a record of the ownership of the stock in the State, or by an officer resident here, and competent to certify the same. Sect. 9, of ch. 953, Laws of 1850, comp'd St., ch. 150, § 67, provides that the treasurer and clerk of railroad corporations shall reside in this State, except where the railroad is part of one created by the acts of two or more States; and this provision is not affected by the fact that the payment of dividends to stockholders is provided for at the place of business of the corporation in this State. The section provides that the clerk and treasurer shall reside "within this State, and all the books, papers and funds of said corporation, with the foregoing exception—*i. e.* in case of a road in two States—shall be kept therein, or shall provide for the payment of all dividends to the stockholders in this State, at the place of business of the corporation in this State." This alterna-

tive provision we think is designed as a substitute for the keeping of funds for the payment of dividends, and the books and papers connected therewith, in this State, and is not to be construed to dispense with the necessity of keeping a record or account of the stock in this State, or of the residence here of the clerk or treasurer. By the Revised Statutes, ch. 146, sect. 13, which is prior to the act in question, no person could be eligible to the office of *clerk* of any corporation unless he was an inhabitant of the State, and it is quite clear, from the whole course of the legislation prior to this law of 1850, that the keeping of the records or accounts of the shares or interests of the corporators, by the treasurer, or other officer in this State, has been steadily contemplated by the legislature. This is manifest by the law requiring the clerk of the corporation to return a list of the stockholders to the town clerk, under a penalty of fifty dollars; Comp. St., ch. 147, secs. 8 to 12; the provision for the attachment of stock, by leaving a copy of the writ and return with the clerk, treasurer or cashier; the provision requiring the officer having the care of the records of stock to exhibit, on demand, to the officer making such attachment; a certificate of the number of shares owned by the debtor, and to exhibit to him such records and documents as may be useful to the officer in discharging his duty, and subjecting him to a penalty and damages for neglect. Comp. St., ch. 207, § 16 to 21. So in relation to manufacturing corporations, it is provided, that if the treasurer does not reside within this State, the stock record shall be kept within this State by the Clerk.

With these provisions and this policy in view, it will hardly be contended that the alternative provision in regard to the payment of dividends in this State is to be regarded as a substitute for the residence of the clerk and treasurer, and the keeping of the stock record in this State. For it is quite obvious that such provision for the payment of dividends can, in no aspect of the case, be regarded as a substitute for keeping the stock record here, and in the hands of a certifying officer of the corporation.

To authorize a construction that would make this alternative pro-

vision a substitute for all the rest, would require language much more explicit than we find there. If, then, an entry of the transfer in the books of the corporation be necessary to a valid transfer as against this plaintiff, we hold that it must be done in the books kept in this State. The question then is, whether such entry is necessary.

In this case both the plaintiff and the Granite Bank were creditors of Holbrook, the former owner of the stock, and both claim under him—one by sale on execution, the other by voluntary transfer from the debtor.

By the law of New Hampshire, as it has existed ever since 1812, stock in all corporations is subject to attachment and execution, and the question is, whether the transfer was so far perfected as to be valid against the plaintiff's attachment.

In deciding this question it is not material to determine the precise character of this property, whether such stocks be regarded as *choses in action* or not; because we are satisfied that it comes within the provisions of the statute of 13 Eliz., c. 5, even if regarded as *choses in action*.

The terms used in that statute in respect to personal property, are "*goods and chattels*," but they are construed to embrace things in action as well as in possession. 2 Black. Com. 384, and note, *Ford & Sheldon's case*, 12 Co. Rep., applying to an Act of Parliament. *Ryal et al.* vs. *Rowles et al.*, 1 Atk. 164, 182 S. C., 1 Ves. 348, 363, 366–7, 369, 371. This case involved the construction of the terms "goods and chattels," in the statute of 21 James 1, relating to conveyances by persons afterwards becoming bankrupt, and it was held that they included a conveyance of a share in a trading concern by one of the partners, and it was expressly held that these terms in an Act of Parliament would include *choses in action*.

And such, we think, has been the doctrine of the courts in this State, as shown in cases of foreign attachment and otherwise. *Hutchins* vs. *Sprague*, 4 N. H. 469; *Giddings* vs. *Colman et al.*, 12 N. H. 153; *Langley* vs. *Berry*, 14 N. H. 82. See *Newman* vs.

Bagley & Tr., 16 Pick. 570; and *Richmondville M. Co.* vs. *Pratt et al.*, 9 Conn. 487.

The claim of the Granite Bank arises from what must be regarded as a pledge, and, to be valid, a delivery is essential at least as against creditors.

To constitute such delivery the assignee should be clothed with the usual marks and indications of ownership.

In the case of things in possession, there should be a manual delivery and change of possession, or its equivalent.

In the case of things in action, the usual muniments of title should be conferred upon the assignee. As to the former, it is held, that if the articles are bulky, the delivery of the key of the warehouse in which they are deposited, will suffice.

Ryal vs. *Rowles*, 1 Ves. 362. See *Patten* vs. *Smith*, 5 Conn. 200.

So in case of the sale of goods at sea, a transfer of the bill of lading by endorsement, is, by the commercial law, valid as to creditors.

Caldwell vs. *Ball*, 1 T. R. 205, 215; *Conard* vs. *Atlantic Ins. Co.* 1 Peters, 444, and cases cited; *Lanfear* vs. *Sumner*, 17 Mass. 112.

A bill of lading is an acknowledgment under the hand of the captain, that he has received the goods and will deliver them to the person named therein, and by the well settled principles of the commercial law is assignable, by endorsement, and this is equivalent to the actual delivery of the goods.

Such transfer is the ordinary and appropriate mode of selling goods at sea; and it was held in *Caldwell* vs. *Ball*, 1 T. R. 205, 215, that where two bills of landing were signed by the same captain, the person to whom one was first transferred would hold the goods. So where the goods sold are in the custody of another, and an order is given to the depository to deliver them to the buyer, which is presented to him, there the sale is complete.

Plymouth Bank vs. *Bank of Norfolk*, 10 Pick. 459; *Tuxworth* vs. *Moore*, 9 Pick. 348.

In the case of real estate mortgaged, and the title deeds are left with the mortgagor, who makes a second mortgage, and delivers the title deeds, the first will, in equity, be postponed to the second: *Ryal* vs. *Rowles*, 1 Ves. 360.

In regard to the assignment of choses in action, as a bond or promissory note, a delivery is essential as against a subsequent assignee, or probably a creditor: *Ryal* vs. *Rowles*, 1 Ves. 348; Bennet, J., p. 362; Parker Baron, 366–7.

As to goods and chattels in possession, a substantial change of possession is, by our law, essential where it can be had. The want of it unexplained, is conclusive evidence of a secret trust, and shows the sale to be fraudulent as to creditors.

In the case of stocks, the natural and appropriate indication of ownership is the entry upon the stock record.

This is indicated by the ordinary course of dealing in such property, and has been assumed in our legislature for many years, and it is manifested in the provisions in regard to returns of stock by the clerks or treasurers for the purposes of taxation; private liability and attachment, all of which assume that the records will show the ownership of the stock; and some of which continue the individual liability so long as the returns, based upon such record, remain unchanged.

In respect to manufacturing corporations, by express provisions a transfer of stock avails nothing against an attachment until entered upon the corporation records. So, too, such record is expressly recognized as essential in the certificates used in the transfer of the stock in question.

Until then, the transfer is recorded, or is entered for record, we think there has been no such change of possession as will prevail against an attaching creditor, unless in cases as before suggested, where due diligence has been used to make such record, and the attachment has intervened.

We are aware that choses in action may be transferred by a simple delivery of the evidence of indebtedness, with an endorsement thereon in certain cases; but it will be observed in these cases, that all such changes in the indications of ownership, as the

nature of the case will admit, is required. If, therefore, upon the transfer of a bond or bill of exchange, it be retained by the assignor, a subsequent purchaser, without notice, would acquire a good title. Indeed, it may be laid down as a general principle governing the transfer of every species of personal property, that to be good against innocent third persons, such transfer must be accompanied with such change of possession and indications of ownership, as the nature of the thing is capable of. Otherwise the seller is enabled, by means of an apparent ownership, to obtain a fictitious credit, and to deceive both creditors and purchasers. To avoid such consequences the law has always watched such conveyances with extreme solicitude.

In this respect we see no distinction between things in action and things in possession, but for anything we can see, the same general rules must apply to both.

It is true that at common law choses in action were not the subject of attachment or execution, except by the custom of London, and then only when the garnishee lived in the city and the debt arose there: Com. Dig., Tit. Attachment, A. D. Nor did it extend to stocks in the East India Company. But now by the laws of New Hampshire, of no distant date, choses in action are made the subject of foreign attachment, and stocks in corporations may now be attached specifically like things in possession.

Under the circumstances, and in view of the rapid increase and the vast amount of such property, it becomes extremely material to make a correct application to this species of property, of the principles which regulate the transfer of other kinds of property. In the case before us, the stock was pledged to the Granite Bank on the eighth day of July, 1854, as collateral security for the owner's indebtedness, by a delivery of the certificates endorsed by him to the bank, of which he was then president, and nothing further was done toward taking possession of the stock until the third day of the following August, when the old certificates were surrendered to the transfer agent, and new ones received by the bank.

The act of transfer by Holbrook must be regarded as done on

the eighth of July, and whatever was done afterwards was the act of the bank; and the question is, whether due diligence was used by the bank in taking possession of the stock. It may be assumed, that as the transfer was made at a distance from the place where the stock records were kept, a reasonable time should be allowed to communicate with the officer; but the case finds nothing, and nothing is suggested that could justify a jury in finding that the entry was made in a reasonable time after the act of transfer. There is no suggestion that the communication was made at the earliest convenient opportunity after the transfer on the eighth of July, and if there was a daily mail communication with Manchester there could be no ground to claim that due diligence was used. Nor could the exchange of certificates at the transfer agency be regarded as equivalent to a record, or the entry for that purpose in the office at Manchester. If forwarded by the transfer agent and recorded, it then would be perfected, but we are unable to regard the act of the transfer agent, in respect to the record, as anything more than the act of a mere agent of the bank.

To give to the notice and entry at the transfer agency the effect of a record or entry upon the stock books of the corporation would, as we think, be contrary to the policy of the law, which requires, as the chief evidence of ownership, the record or entry in the books of the corporation kept in this State. Such a rule is simple and easy of application, and is demanded for the convenience of the corporation and the interests of the stockholders and their creditors.

The transfer agent is in no sense the keeper of the stock record, and notice to him is not notice to the keeper of that record. The case, then, is one where due diligence was not used to take possession of the stock; but in respect to the creditors of Holbrook it was for nearly one month left in his possession, he retaining, as before, the usual indications of ownership, such as membership of the corporation, and a right to vote on the stock, his private liability for debts, and his liability to be taxed, being for all purposes the ostensible owner of the stock. Indeed, the retaining these evidences of ownership in the case of an absolute sale of the stock, or any transfer which implies a delivery, would be no less inconsis-

tent, and no less indicative of a trust than the retaining possession of goods capable of manual delivery upon an absolute sale. If there be any substantial difference the inconsistency would be more marked in the case of the stock, inasmuch as in case of goods and chattels which are tangible, it is often convenient to disconnect the use from the ownership for a time; and we are inclined to think that the retention of the possession of goods, which are tangible, would be less likely to mislead creditors and purchasers than the omission to make the proper entry in the stock record on the transfer of stocks. Such a neglect to perfect the transfer of stock as this case discloses, could scarcely fail to excite suspicions as to the existence of a fixed intention to perfect the transfer, at all, at the time it was made. Whatever the fact may be in this case, it is quite apparent that if such transfers are held good as against creditors, it would open a wide field for the mischiefs which are denounced by the statute of 13 Eliz. Especially would it be so in these times, when so large a proportion of all the property of the country is in corporation stocks.

We are brought to the conclusion, that the possession of the stock was not changed, and that no satisfactory explanation for it is given; and that, therefore, there is shown a secret trust, which avoids the transfer as to this plaintiff.

The conclusion we have reached on this point renders it unnecessary to consider the other.

The only question remaining is as to the measure of damages.

The general rule here and elsewhere is, that in an action on a contract to deliver goods, stocks, and other personal property, the measure of damages is the value of the property at the time and place of delivery.

But a distinction has been made in some jurisdictions, by which, where the price has been paid in advance, the plaintiff has been allowed to elect the value at the time when the property ought to have been delivered, or at the time of trial, or, as some cases hold, the value at any intermediate period.

Such a distinction has been recognized in England and in New York, and in the Courts of some other States in the Union, upon

the ground that the seller, having got the money of the plaintiff, the latter may be deprived of the means, by the seller's act, of going into the market and purchasing the same property at the then market prices.

In *Shepard* vs. *Johnson*, 2 East. 210, it was held, in an action for not replacing stock loaned at the time appointed, it having afterwards risen, that the measure of damages was the value at the time of trial.

This doctrine, and the reason for it, was recognized in *Gunning* vs. *Wilkinson*, 1 C. & P. 625, which was an action of trover for East India warrants for cotton, which had risen after the conversion. So in *Ganisford* vs. *Carrol et al.*, 2 B. & C. 624; *McArthur* vs. *Ld. Seaforth*, 2 Taunt, 257; *Payne* vs. *Burke*, 2 East. 213; note to *Shepard* vs. *Johnson*; *Downes* vs. *Buck*, 1 Starkie Rep. 318, it was held that plaintiff might estimate his damages at the value of the stock at the time of trial. In *Harrison* vs. *Harrison*, 1 C. & P. 412, on a bond to replace stock, it was held that the value at the time of trial was the measure of damages.

These cases go upon the ground that a judgment for damages, equal to the market value at the time of such judgment, would enable the plaintiff to purchase similar property, and thus operate like a decree for specific performance of the contract.

Mr. Starkie, in his work on Evidence, vol. 3d, 1624, lays it down, that the damages may be the value at the time of delivery or the time of trial, "or, as it seems, on any intermediate day;" but he cites against the rule *McArthur* vs. *Ld. Seaforth*, 2 Taunt. 257.

In 3 Phillips' Evidence, 103, it is said that the plaintiff may elect the value at the time of delivery, or the time of trial, but not, as it seems, upon any intermediate day; and see 1 Saund. on Plead. & Evidence, 377 and 677, and Chitty on Contracts, 393, note 2, by Perkins.

In *Dutch* vs. *Warren*, which is stated in *Moses* vs. *Macfarlan*, 2 Burr. 1010, where there was a contract to deliver stock, the price being paid in advance, held, that the value at the time of the breach was the measure of damages, though less than the sum paid.

So on a loan of stock to be replaced at a certain day, held, that the measure of damages was the value on that day. *Saunders, Kentish & Hawkesly*, 8 T. R. 162. In *West* vs. *Wentworth et al.*, 3 Cowen Rep. 82, it was held, that for the breach of a contract to deliver salt, the price having been paid in advance, the measure of damages was the highest market price between the time the salt was due and the time of trial; and the cases cited to sustain the decision are *Cartelyan* vs. *Lansing*, 2 Caines' Cas. Err. 216, and *Shepard* vs. *Johnson*, 2 East. 211, neither of which goes to that extent.

The case of *Clark* vs. *Pinney*, 7 Cowen, 681, decided by the same Judge, SUTHERLAND, takes the same ground after a review of the English cases, and these decisions have been followed by the Courts of some other States, as in *Bank of Montgomery* vs. *Reese*, 26 Penn. 143, which was an action against the plaintiff in error for wrongfully refusing to allow the defendant in error to subscribe for and receive certain stock in the bank. The Court fully recognizes the rule laid down in *West* vs. *Wentworth* and *Clark* vs. *Pinney*, as applicable to stocks, but suggests a different rule in respect to articles which are unlimited in production. The Court hold, however, that it is immaterial whether the stock has been paid for or not, but that the rule is the same in either case, and the Court cites *Cud* vs. *Rutter*, 1 P. Wms. 570, and note, which holds the same doctrine, as it would seem, where the price was not paid in advance, and citing also *Vaughan* vs. *Wood*, 1 Mylne & Keen, 403. In *West* vs. *Pritchard*, 19 Conn. 212, it was held, that plaintiff was entitled to the value at the time of trial, or at the time appointed for the delivery, and that this rule applies to other personal property as well as stocks, although in *Wells* vs. *Abernethy*, 5 Conn. 227, HOSMER, C. J., had expressed a strong repugnance to the doctrine. *Nandon* vs. *Barlow*, 4 Texas, 289, and *Calvit* vs. *McFadden*, 13 Texas, 324, accord with *West* vs. *Pritchard*, in giving the value at the time of trial. In *Shepard* vs. *Hampton*, 3 Wheat. 200, is a dictum of MARSHALL, C. J., to the effect simply, that he should think the value at the time of delivery would not be

the rule where the price was paid in advance, but he does not state what it should be.

On the other hand, the case of *Startup* vs. *Cortuzzn*, 2 Crompton, Meeson & Roscoe, 165, is in opposition to the dicta in *Gainsford* vs. *Carrol*, and to *Clark* vs. *Pinney*, and *West* vs. *Wentworth*. In that case, which was an action for not delivering a cargo of linseed according to a contract of sale, on which the plaintiff had advanced a moiety of the price, Lord Abinger charged the jury that plaintiff was not entitled to damages according to the value at the time of trial, and that it was not like a suit for not replacing stock—and this was sustained, on motion for a new trial, by the whole court—there being no evidence that plaintiff had in fact sustained any special damage. See a statement of this case in *Suydam* vs. *Jenkins*, 3 Sandf. Sup. Ct. Rep. 641, where DUER, J. reviews the cases, and holds, in opposition to *West* vs. *Wentworth*, and *Clark* vs. *Pinney*, that the highest intermediate price ought never to be taken as the rule of damages, either in trover or assumpsit, unless it be shown that the plaintiff *would* (*not* might) have realized that price had the contract been performed.

This case, commencing page 614, is an elaborate review of the cases, and the court hold that the rule of damages must be the same in trespass, trover, replevin, or assumpsit.

Mr. Chancellor Kent, in 2d Com. 648, 480, note, says he does not regard the distiction as to the rule of damages arising from a payment of the price in advance, or not, as well founded or supported; and he says that the value at the time of the breach is a plain, stable, and just rule; and so it seems is the conclusion in Sedgwick on Damages, after a review of the cases, p. 260 to 280, 277; and see cases cited in 2 Kent's Com. 648 in note. In *Gray* vs. *Portland Bank*, 3 Mass. 364–390, it was held that the value of the stock at the time of delivery, and not on the day of trial, was the true measure of damages; and the case of *Shepard* vs. *Johnson*, 2 East. 211, is expressly denied. SEDGWICK, J., says this rule has been long established and invariably adhered to in Massachusetts. The same rule was applied in *Kennedy* vs. *Whitwell*, 4 Pick. 466, which was in trover, and after the defendant

sold the goods for a greater price; but it was held that the value at the time of the conversion was the measure of damages, and so in *Sergeant et al* vs. *Franklin Insurance Company*, 8 Pick. 90, it was held that the value of the stock at the time it should have been transferred was the rule, and the court adopt the doctrine of *Gray* vs. *Portland Bank*, and *Kennedy* vs. *Whitwell*, and considers this case as standing on the same ground as the conversion of goods; and so is *Henry* vs. *Manufacturers and Mechanics Bank*, 10 Pick. 415, where certificates of stock were withheld. In replevin, the value of the property when it ought to have been restored, is the true measure of damages: *Swift* vs. *Barns*, 16 Pick. 194–6; in *Smith* vs. *Dunlop*, 12 Ill. 184, which was much considered, and the English and New York cases examined, the rule in Massachusetts is sustained. In *Hopkins* vs. *Lee*, 6 Wheat. 106, held that the value of the land, when it ought to have been conveyed, which was when it was paid for, was the measure of damages. So in *Cox* vs. *Henry*, 32 Penn. St. Rep., 18, which was a contract to convey real estate; the price having been paid in advance, it was held that the value at the time it should have been conveyed is the measure of damages. In *Mitchell* vs. *Gill*, 12 N. H., 390, it was said that the value at the time of the breach is the measure of damages. But this is laid down as a general proposition, and the distinction arising from previous payment is not adverted to, nor do we find such a distinction recognized in any New Hampshire case. See also *Stephens* vs. *Lyford*, 7 N. H. 360.

There being, then, much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock.

The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach, and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that in some cases the plaintiff may have been injured to the extent of the value of the pro-

perty, at the highest market price, between the breach and the time of trial.

But it is equally true, that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases, where the articles to be delivered entered into the common consumption of the country in the shape of provisions, perishable or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dye stuffs, &c.; to hold that the plaintiff might elect as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages wholly disproportioned to the injury. For, in most of the cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause by review, new trial, or otherwise; shall there be a different measure of value at each trial?

In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations, and to hold that the damages should be the highest price between the breach and the trial, where there is no reason to suppose that a sale would have been made at that precise time, would also be unjust.

But it may be fairly assumed that a very large proportion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before trial, which might often be several years, would be giving him not indemnity merely, but a power in many instances of unjust extortion, which no court could contemplate without pain. In view of such results the courts in England and New York have been inclined to shrink from the application of that rule in many cases, and it has been held that it would not be applied where the action was not brought in a reasonable time;

and this undoubtedly because of the injustice of allowing the plaintiff to take advantage of the fluctuations of many years. But, even if brought in a reasonable time, and what is a reasonable time is not easy to say, there might be often a lapse of many years before a final trial.

In actions of trover, trespass, and replevin, there would be stronger reasons for the application of such distinction than in cases of contract; inasmuch as the plaintiff is not only deprived of the use of his property, and the means to replace it, from the avails, but is so deprived by the tort of the defendant.

If then the rule is just, it should be applied in these actions; the form of the action not being material in this respect—and in jurisdictions where this doctrine is recognized, it has been so applied, as in *Wilson* vs. *Mathews*, 24 Barb. 295; and *Greening* vs. *Wilkinson*, 1 C. & P. 625, which was trover for East India warrants for cotton. In *Wilson* vs. *Mathews*, the highest market price between the breach and the day of trial was held to be the rule. In this State no such rule has been adopted, and it requires no citation of authorities to show that as applied to actions of trespass, trover or replevin, it would find no countenance here.

The same reasons which oppose the right of electing the value at any intermediate day, as the rule of damages apply also to an election between the time of the breach and the time of the trial, and we are disposed to hold the value at the time of the breach, or when the articles ought to have been delivered, as the just and convenient rule.

In accordance with our views is the case of *Wyman* vs. *American Powder Works*, 8 Cush. 168. In that case the corporation refused to give the plaintiff a certificate of shares to which he was entitled, or to recognize him as owner, but sold them to another. And it was decided that the defendant was liable to the value of the shares at the time of the demand, and interest from that time, and with this decision we are satisfied.

Therefore, after reducing the amount to accord with these views, there should be judgment on the verdict.

The learned judge has discussed the cases so much at length in the foregoing case, that little more remains to be said upon the questions involved.

1. The question in regard to what constitutes a delivery of shares in a joint-stock company is liable to arise in so many different forms, that it is difficult to lay down any universal rule upon the subject.

1. The contract, as between the immediate parties, is sufficiently executed, and the title completely passed, as a general thing, by the mere assignment and delivery of the certificate of the shares. PARKER, Ch. J., in Howe *vs.* Starkweather, 17 Mass. R. 244; Sargent *vs.* Franklin Ins. Co. 8 Pick. R. 98: Wilson *vs.* Little, 2 Comst. R. 443. And this may be effected generally by a blank endorsement upon the certificate of shares, which the holder may fill up at his convenience. Kortright *vs.* Buffalo Com. Bank, 20 Wendell, 91; Angell & Ames on Corp. § 564.

But where the charter of the company, or the general laws of the State, contain any specific restriction or requirement in regard to such transfer, it must be complied with, or the title does not pass. Fisher *vs.* The Essex Bank, 5 Gray, 373; Sabin *vs.* Bank of Woodstock, 21 Vt. R. 362; Pittsburgh and Connelsville Railway *vs.* Clarke, 29 Penn. St. R. 146.

2. But, in most of the States, this mere delivery and transfer of the certificate of shares will not be regarded as sufficient notice of the transfer, as to creditors and subsequent purchasers, who have bona fide acquired title in ignorance of the former transfer. For that purpose some notice given at the place where inquiries in regard to the title of the shares would most likely be made, seems to be required. This is the more common mode of effecting the delivery of choses in action.

Thus, notice to the trustees of equitable property, by the rules of equity jurisprudence, as administered in the English courts, gives a priority over an earlier assignment without such notice: 1 Story Eq. Ju. § 421 b; Foster *vs.* Blackstone, 1 My. & Keen, 297; Timson *vs.* Ramsbottom, 2 Keen R. 35. In Dearle *vs.* Hall, 3 Russ. R. 1, Lord Lyndhurst said: "In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of a fund becomes a trustee for the assignee who has given him notice." A different rule prevails in the State of New York; but it is not regarded as resting upon any satisfactory foundation: 1 Story Eq. Ju. § 421 c, and cases cited.

3. It is upon this ground mainly, we apprehend, that notice is required to be given of the transfer of shares in joint-stock companies at the office where the principal records of title in the capital stock is kept; since the company itself being a mere trustee of the capital stock for the shareholders, notice to them will perfect the delivery of the equitable title to the shares; and being a trust, which is always a mere equity, it is not susceptible of any other than an equitable delivery. Sturges *vs.* Knapp, 31 Vt. R. 1, 53. All corporate action, as well that of the directors and agents as of the corporation itself, is but a succession of trusts, in regard to which the creditors of the corporation, in the order of their priority, are the primary, and the shareholders the ultimate *cestuis que trust.* Ib.

4. If, then, notice is to be given the trustee, in order to perfect the transfer as against creditors and subsequent purchasers, it must be done at the place where such notice is usually received and registered; and it should be in a

form to gain credit, and to enable the company to preserve it in their usual mode of preserving such facts, and that is by entry upon their books of transfer, which would bring us to the same result arrived at in the principal case: 1 Story Eq. Jur. § 400 b, and cases cited. This subject of the requisite notice of the transfer of equitable rights and of choses in action, as well as of the delivery of chattels in the keeping of third parties, is considered in the late case of Rice *vs.* Courtis, 32 Vt. R. 460. The rule in Vermont requires more to be done in the case of personal chattels in the possession of third parties, in order to effect a delivery, than in most other States. It requires that the keeper should consent to become the bailee of the purchaser; while, in other States, the notice makes him such bailee, and if, after that, he treat the former owner as still entitled to control the property, he will make himself responsible to the purchaser. Chitty on Cont. 406, et seq. Cases cited above.

II. In regard to the rule of damages adopted by the Court in this case, there can be no question as applicable to the ordinary case of the refusal to deliver articles readily obtainable in the market. The English courts have attempted to make the case of shares in joint-stock companies, and some others, exceptions, and to give such damages as will more completely indemnify the owner for the loss of the article.

1. Equity will decree specific performance of a contract to deliver shares in a joint-stock company, since they may not always be attainable in the market. Duncuft *vs.* Abrecht, 12 Simons R. 189; Shaw *vs.* Fisher, 5 De G. M. & G. 596; Story Eq. Jur. §§ 724, 724 a; Taylor *vs.* Great Indian Peninsular Railway, 4 De Gex. & Jones, 559; S. C. 5 Jur. N. S. 1087. But will not grant such decree for the specific performance of contracts for the delivery of public stock in the national funds, which may always be obtained for the market price. Redfield on Railw. § 38, pl. 2, and cases cited in notes.

2. The more usual remedy against the corporation for refusing to allow the transfer of their shares into the name of one who turns out upon the trial to have been the real owner, and entitled to have the shares stand in his name, is by bill in equity. In Davis *vs.* The Bank of England, 2 Bing. R. 393, where the owner of shares in the defendant's company brought an action to recover the value of them and of the dividends declared upon them, on the ground that the bank had refused to recognize him as the owner, and had suffered them to be transferred into the names of third parties, by virtue of forged powers of attorney, the Court said, "We cannot do justice to this plaintiff unless we hold that the stocks are still his," and therefore denied the action for the value of the stocks, but allowed the party to recover the dividends which had been declared and not paid. See also Taylor *vs.* Great Indian Peninsular Railway, supra.

3. But if the recovery of damages is to be made the equivalent of such stock, as in many cases it is obvious it must be, there seems no other rule so satisfactory as the one here adopted. The idea of giving one the advantage of the rise of the market as long as the action remains undetermined, is certainly a most fanciful conceit, and could only have arisen from regarding the defendant as wholly in the wrong, and thus entitled to demand no favor at the hands of the Court. This may do well enough in cases where the party has acted wantonly or in bad faith; but, in the ma-

jority of cases, the defendant may well be presumed to have acted in the same good faith as the plaintiff; and if so, there is no reason why he should be mulct in an amount of damages altogether beyond what it is made reasonably certain the other party has suffered by his default. The same view of the general rule of damages is taken in the late case of Hill *vs.* Smith et al, 32 Vt. R. 433, and there can be no question it is destined to prevail in all the courts of this country.

I. F. R.

In the Circuit Court of the United States for the Western District of Pennsylvania.

CONSTANT *vs.* THE ALLEGHENY INSURANCE COMPANY.[1]

1. Though by the Charter of an Insurance Company it is provided that "every contract, bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the President, or, in his absence or inability to serve, by the Vice President or other officer, &c., and duly attested by the Secretary or other officer, &c.," a parol agreement as to the terms on which a policy shall be issued, made by the President, Secretary, or other general agent of the company, may, nevertheless, be enforced specifically in a court of equity, which, in case of a previous loss, will be by a decree for the amount which would be due upon a policy duly executed; GRIER, J.
2. But a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced.
3. The plaintiff, through a broker, applied to the defendants for an insurance on a boat for a definite amount, and was informed that "it would be taken." The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker, on receiving the policies, wrote, in the absence of his principals, to the defendants, to say that he doubted whether the agency policies would be accepted, alleging as a reason, that the particular agent had not a *good reputation* for "*settling losses,*" and added, "*I don't know whether it is your custom to guarantee the offices you insure in*, or not; if *you do*, I may prevail on" the plaintiff "to hold the policies." The Secretary of the defendants in reply, wrote: "In handing the policies" to the plaintiff, "you can say that if the boat is not insured *in offices satisfactory* to him, we will have them *canceled;* but, *though they are not re-insurances*, yet in case of loss we will *feel ourselves bound for a satisfactory adjustment.* We deem the companies good, and *if any parties can settle with them, we can.*" On the faith of this letter the plaintiff closed

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[1] From the MSS. of 3 Wallace, Jr.

the transaction. One of the substituted companies afterwards became insolvent, and, a loss having occurred, a special action on the case was brought against the defendant: *Held*, (1.) That the Secretary of the defendants had no general authority to bind them by a guaranty of the solvency of the substituted companies; and, (2,) if he had, his letter did not amount to this, but only to an undertaking for a satisfactory determination of the amount of the loss, and its apportionment between the insurers.

Constant and others, including the captain of it, Bowman, were owners of a steamboat, upon which they were about to make an insurance. One Springer was a correspondent of the Allegheny Insurance Company of Pittsburg, the defendant in the case, and in the habit of getting customers for it, which he had authority to do, but he had no authority to make contracts for the Company. Captain Bowman, for himself and in behalf of the other owners, applied to Springer, as agent of the Allegheny Company, to get an insurance of $20,000 on the boat. Springer communicated with the Company by telegraph, to know if *they* would take the risk, and received for answer "*that it would be taken;*" and Springer so informed Bowman, who requested Springer to write to defendants to take the risk. Springer did so, informing them of the names of the owners, and their respective interests. The defendants agreed to take the risk, and sent to Springer five policies of insurance, covering the risk of $20,000; two of them of $2,500 each, in favor of Captain Bowman, executed *by themselves;* one for $5,000, in favor of Bowman, executed by the "*Pennsylvania* Insurance Company;" one for $5,000, in favor of plaintiff, executed by the "*Quaker City* Insurance Company;" and the other for $5,000, executed by the "*Commonwealth* Insurance Company," in favor of the remaining owner, one McGhee.

When these five policies were received the owners and the boat were absent on their voyage, and Springer wrote to the Secretary of the Allegheny Insurance Company as follows:

"Your favor, together with the policies on the steamer, came to hand. I was very much disappointed in receiving the three policies from agencies. Altogether I am very much afraid, when the boat comes back, that the owners will not have them. They expected them to be taken in Pittsburg offices, and they were issued

by Mr. Carrier, whose reputation for *settling losses* is not very good in this city. As far as my own knowledge goes, he never *settles without a law-suit.* I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on them to hold the policies. I will keep the policies until they return, and do the best I can to get them to keep them; but I know the owners are very much prejudiced against the 'Commonwealth' and 'Quaker City,' (they have agencies here,) and if they will not keep them, I can only return them. I can say no more until the boat returns."

To this letter the Secretary of the Company defendant replied, as follows:

"In handing the policies to the owners of the boat, you can say, that if she is not insured in offices satisfactory to them, we will have them canceled; but though they are not re-insurances, yet in case of loss we will feel ourselves *bound for a satisfactory adjustment.* We deem the companies good, and if any parties can *settle with them, we can.*"

When Springer presented the policy of insurance executed by the Quaker City Insurance Company, to the plaintiff, he objected to it. Springer then informed him of the contents of the letter aforesaid, upon which the plaintiff "gave his premium note for $750, and the matter was closed."

It may be pertinent to observe, that by legislative enactment, insurance companies in Pennsylvania, except in cases of special charters, are "empowered to make, execute and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require, and every such contract, bargain, policy, and other agreement shall be in writing or print, under the corporate seal, and signed by the President, or in his inability by the Vice President," &c., and that subject to this act the Allegheny Insurance Company, the present defendant, held its charter.[1]

Soon after the insurance effected by the correspondence and acts

[1] Act of 2d April, 1856, § 10, and Act of 29th January, 1859, P. L. p. 10.

already mentioned, the steamboat was lost; and the *Quaker City* Company having become wholly insolvent, this suit, a special action on the case was instituted at law, to recover the amount from the defendant, the *Allegheny* Company.

The facts as above stated, were found on a special verdict; judgment being to be entered for $5,265 83, if the Court thought that they made out a case for the plaintiff, otherwise for the defendant.

The opinion of the Court was delivered by

GRIER, J.—To entitle the plaintiff to judgment on this verdict, he must show

1st. That on the facts as found the Secretary of the Insurance Company could legally bind the Company to guarantee an insurance made by another Insurance Company.

2d. That such a promise or agreement was made, in such form as to support an action at law against the corporation.

By its act of incorporation this Company could make insurance which would be legally valid only by a policy attested by the President, Secretary, and the seal of the corporation. Yet, before such instruments are attested in due form, the President or Secretary, or whoever else may act as a general agent of the Company, may make agreements, and even parol promises, as to the terms on which a policy shall be issued, so that a Court of Equity will compel the Company to execute the contract specifically;[1] and where the loss has happened, to avoid circuity of action the Chancellor will enter a decree directly for the amount of the insurance for which the Company ought to have delivered their policy, properly attested.

The Secretary of the Company, in this case, replied by telegram to one sent by Springer, who acted as a broker or mutual agent of the parties, not that the defendants would themselves take the whole risk of $20,000, but "that it should be taken." The Company showed their construction of their undertaking by transmitting policies to the amount requested, equally divided among four insurances companies, as negotiated by defendants, and divided

[1] See Com. Ins. Co. *vs.* Union Mutual, 19th Howard, U. S. Reports, 318.

among the three several owners of the boat, according to their respective interests. The objection made by the insured was not to the manner in which the risk was divided, but that the agent of one of the companies, (the Quaker City,) had the character of being a very troublesome person to deal with in case of a loss which would require adjustment.

Assuming the representation of the Secretary, that in case of loss "we will feel ourselves bound for a satisfactory adjustment," is an agreement to guarantee the solvency of the Quaker City Insurance Company, had the Secretary authority to make a simple or parol contract to bind his principal to guarantee the solvency of another company? We think he had not. Every promise to make a policy of insurance under the seal of the Company, and the terms on which it will be done, falls necessarily within the scope of the authority confided to such agent; but any other merely collateral promise or representation, which does not involve the execution of a policy of insurance, is not within the scope of his authority, as agent, because it is not strictly within the scope of the powers granted to the corporation.

Whether the officers of the corporation could, by covenant, duly executed, but not in the form of a policy of insurance, bind the Company to perform such a contract, we need not inquire. This is a suit at law, and the plaintiff must show a legal obligation, executed according to the forms required by the law, which confers the corporate powers on the defendant. And if it were a bill in equity, the Chancellor would decree only a specific execution, to wit, the delivery of an instrument of writing, executed and attested according to law, and such as was within the powers of the corporation as provided by their charter.

But assuming that this parol promise, as stated in the Secretary's letter, would support a suit at law against the Company, is there a promise to guarantee the solvency of the Quaker City, or any of the three other companies who joined in taking this risk of $20,000? The parties did not complain that the defendants would not take the whole risk on themselves, but had it negotiated and divided among other companies. The objection was not made to the

solvency of any of the companies, but on the anticipated difficulties of *adjustment* in case of a loss occurring. The undertaking of the Secretary is not that the defendant shall pay the amount of the loss, but to take the trouble of *adjusting* the loss with this captain's agent. This might be an easy matter for the defendants' officers to perform, as the very same adjustment would have to be made with and for themselves, and other companies who were not infested by such an agent.

The adjustment of a loss is defined to be the "settling and ascertaining of the indemnity which the assured, after all allowances and deductions made, is entitled to receive under the policy, and fixing the portion which each underwriter is liable to pay."

Now, the direction of the Secretary to Springer is to tender the policies, and if they are not satisfactory to the owners, to cancel them; stating that they are not re-insurances, and that "we feel ourselves bound" not to pay the losses if the other insurers should be insolvent," but "for a satisfactory *adjustment*," and adding, "we deem the companies good, and if any parties can settle with them, we can." Here is no guarantee. The whole length and breadth of this undertaking is a satisfactory *adjustment* of the loss, and no more.

The facts as found by the jury, do not, therefore, support the claim alleged in the declaration. The defendants are consequently entitled to judgment on the special verdict.

Judgment for the defendant.

The preliminary question presented in the foregoing case, as to the effect of a parol insurance, is of considerable interest and importance, and though it may be considered as to a great degree settled in this country by the authorities which will be presently cited, a few observations on the grounds on which the principal decisions have been rested, may not be altogether superfluous.

While it is difficult to say at what precise time the practice of insurance was introduced or became general in Europe, it is certain that for a considerable period neither express regulation nor usage made any particular form essential to its validity, and that the contract was often left in parol; the assured, says Cleirac, trusting to the good faith and honesty of the other party. "But," he adds, "the abuses and disputes which resulted from this mode of dealing, caused its abolition; and it has even been subsequently provided that the contract shall be made either in the presence of a notary, or by the intervention

of a register of policies of insurance." Valin, Comm. sur l'Ord. de la Mar., liv. iii., tit. vi. § 2; 3 Boulay Paty, 244. The change, which required the contract to be in writing, is said to have been first effected by an ordinance of the Magistrates of Barcelona, in the year 1484, and has since been followed by all the principal commercial codes of the continent. Whether such provisions concern the substance, or merely the evidence of the contract, has been a matter of considerable discussion. Under those contained in the former *Ordonnance de la Marine*, and in the present *Code de Commerce*, art. 332, which direct simply that the contract "shall be drawn up in writing," it has been considered that this does not make a verbal contract void in itself, but simply precludes its proof by oral testimony, leaving it still possible to establish it by the written admissions of the parties, or by reference to the *serment decisoire*, the examination of the defendant under oath; Pothier, No. 99; Valin, ut supr.; 3 Boulay Paty, 247 (tit. x. sect. 1;) 3 Pardessus Cours de droit Com. §792; though, see Emerigon on Insurance (by Meredith) p. 25. Indeed, by the very terms of the *Code*, the contract may be by any private writing under the hands of the party, containing all its essential terms.

These citations are made because it seems to have been sometimes supposed that by the general commercial law of the continent, a contract of insurance must necessarily be contained in some such formal written document as that which we now designate as a "policy," whereas it is a mere matter of municipal regulation, varying in different countries. There can be no doubt that at common law a verbal contract of this character was valid: and it is so now in England, except so far as it is affected by the Statute of Frauds, or the Stamp Act. In this country, particularly in the large commercial towns, a great deal of the business of insurance is done upon parol agreements, and even the subsequent issue of a policy is often dispensed with. The sudden exigencies of commerce, and the use of local agencies, make this sometimes a matter of necessity. Therefore, though the question as to the validity of such agreements has been raised at times with apparent earnestness, they have been generally sustained by the courts. The proper course is to proceed in equity for a specific performance of the agreement by the issue of a policy in due form, and where a loss has actually occurred, a decree may be entered at once for the amount: McCullough *vs.* Eagle Ins. Co., 1 Pick. 280; Hamilton *vs.* Lycoming Ins. Co., 5 Barr, 342; Delaware Ins. Co. *vs.* Hogan, 2 Wash. C. C. 4; Perkins *vs.* Washington In. Co., 4 Cow. 645; Tayloe *vs.* Merchants' Fire Ins. Co., 9 How. 465; Commercial Mut. Marine Ins. Co. *vs.* Union Mut. Ins. Co., 19 How. 318; 2 Curtis, 524; Trustees of First Bapt. Church *vs.* Brooklyn Fire Ins. Co., 19 N. Y. 305; 18 Barb. 69; Palm *vs.* Medina Fire Ins. Co., 20 Ohio, 529; Mobile Dock, &c., Co. *vs.* McMillan, 31 Alab. 711. And in some cases it has been held that an action at law would lie: McCullough *vs.* Eagle Ins. Co., Hamilton *vs.* Lycoming Insurance Co., Mobile Marine Dock, &c., Co. *vs.* McMillan, ut supra. After a loss, the damages in such an action would probably be the same as if a policy had in fact issued; but, in general, the remedy in equity is the most efficient. So where, after an agreement, a policy has been executed, but is withheld from the insured, trover will lie: Kohne *vs.* Ins. Co. of North America, 2 Wash. C. C. 93; see Watson *vs.* McLean, Ellis Bl. and Ell. 73, and note.

But this is not all; it has further been

held, as in the foregoing case, not to be material that, by the charter of the Insurance Company or by a general law, policies and other contracts of insurance are to be under seal, signed and countersigned by particular officers. Comm. Mutual Marine Insurance Co. *vs.* Union Mutual Insurance Co. ut supr.; McCullough *vs.* Eagle Insurance Co. ut supr.; New York Insurance Co. *vs.* De Wolf, 8 Pick. 63; Trustees, &c. *vs.* Brooklyn Fire Insurance Co. ut supr.; see Myers *vs.* Keystone Insurance Co., 27 Penn. St. 270; but see Cockerill *vs.* Cincinnati Mutual Insurance Co., 16 Ohio, 148, which, however, seems overruled by Palm *vs.* Medina Insurance Co., 20 Ohio, 529, so far, at least, as the remedy in equity is concerned. The reasons usually assigned are, that the particular modes of contracting pointed out in the statute do not necessarily exclude others, and that the agreement in such case amounts not to an insurance itself, but to a contract to execute a policy in the required form. Still it must be confessed that the distinction, however ingenious, is not altogether satisfactory. The Legislature could hardly have meant to insist on certain formalities in the execution of a policy, and yet to permit so simple a mode of evasion as the substitution of an informal but binding agreement in place of the regular contract. Perhaps the difficulty may be somewhat removed by considering the payment of the premium, and the delivery of the usual receipt or memorandum, as analogous to part performance under the statute of Frauds. The relief being on this hypothesis exclusively in equity, and therefore subject to the discretion of the Court under the whole circumstances of the case, many of the dangers which the Legislature may be supposed to have intended to guard against will be precluded. A further advantage which this view presents is, that the insurance is thereby made to relate to the time when the agreement was actually concluded,—whereas, if the latter is to be considered merely as a *contract for the execution* of a policy, it raises several difficult questions as to whether a reasonable time is to be allowed for the execution, whether a demand must be made by the insured, or whether a non-compliance by him, with some collateral or unimportant regulation, would justify a refusal or delay to execute, all of which might affect or postpone the time of the actual commencement of the risk.

Be this as it may, there are obvious reasons why the doctrine of these last-mentioned decisions should not be extended too far. Experience has shown that the most fertile sources of litigation in insurance cases are, first, disputes as to the declarations and representations of the parties, and, second, disputes as to the authority of agents or officers of insurance companies. It is wise legislation which seeks to mitigate these evils by requiring as far as possible, consistently with the exigencies of business of which we have spoken, that the terms of the contract shall be put in writing, and evidenced, on the part of the corporation, by the signatures of officers as to whose powers there can be no question. Perhaps we may be justified, by these considerations, in confining the class of cases to which we refer, to those which are strictly within the scope of the ordinary business of the Company, and where also, from the necessity of the case, the preliminaries of the contract must be settled in an informal manner.

H. W.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Marine Insurance—Freight in Advance—Recovery for.—The owner of a cargo, who has paid the freight in advance to the owners of the vessel, cannot recover on a policy of insurance by which prepaid freight is insured: *Minturn* vs. *Warren Insurance Company.*

Criminal Law—Larceny—Principal and Accessary.—One who, in pursuance of a preconcerted plan, devised by himself, remains below stairs in his own house, while his confederate above secretly and by night takes the pantaloons and money of a lodger there, and brings them down stairs, and there delivers the money to him, and he receives the same, is liable for the larceny as a principal: *Commonwealth* vs. *Lucas.*

Landlord and Tenant—Liability of Administrator of Lessee for Rent.—An administrator of a lessee, who does not quit and surrender the demised premises immediately after his appointment, or upon a notice to quit, until a judgment for the possession thereof has been obtained against him, but keeps the property of his intestate there for several weeks, and sells it by auction upon the premises, and claims of an under-tenant of a portion of the premises, rent which accrued after his intestate's death, must be held to have entered and taken possession of the premises, and is personally liable to the lessor for rent thereof, until his estate therein was terminated by the notice to quit, to the extent of the real value of the use of the premises: *Inches* vs. *Dickinson.*

Way—Location of Undefined—Loss by Non-user.—The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed: *Bannon* vs. *Angier.*

Proof of mere non-user of a way created by deed, for a period less than twenty years, without proof of adverse enjoyment by the owner of the land, is not sufficient proof of an abandonment of the right: *Ib.*

Way—Right of Action of Tenant at Will for obstruction of.—A tenant at will of land may sustain an action for an interruption of a passage way appurtenant to the land occupied by him: *Foley* vs. *Wyeth, Executrix.*

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[1] The following abstracts have been furnished by Charles Allen, Esq., the State Reporter.

Negligence—Injury to Adjoining Land by Excavation—Right of Tenant at Will to sue for.—If the owner of land makes an excavation in it so near to the adjoining land of another proprietor that the soil of the latter breaks away, he is responsible for all the injury thereby occasioned to the land, and also for the disturbance of a right of way over the land, without proof of carelessness, negligence, or want of skill in making the excavation, but not for injury to buildings which have been placed upon the land: *Foley* vs. *Wyeth.*

One who is in the occupation of land, which he has agreed to purchase by a written contract which contains no stipulation that he may have possession until the price is paid, is a mere tenant at will, and cannot sustain an action for an injury to the reversion, although he subsequently becomes the owner of the land in fee: *Ib.*

In an action for an injury to the plaintiff's land, resulting from an excavation made by the defendant upon his adjoining land, by means of which the plaintiff's soil has broken away and fallen, it is no defence that the injury would not have occurred but for the acts of persons other than the plaintiff, in erecting buildings upon their own land: *Ib.*

Marine Insurance—Sale of Vessel at Port of Distress—Actual or Constructive Total Loss, Evidence of—Wrongful Sale by Consul.—No constructive total loss can be claimed by reason of a sale of a vessel at a port of distress, unless the sale is made by the master, if he is present and in charge of the vessel: *Paddock* vs. *Com. Ins. Co.*

No recovery can be had for an actual total loss occasioned by a storm by which a vessel and her outfits are destroyed in a port of distress into which she has put, and where, before the occurrence of the storm, she has been surveyed, condemned and sold, under the direction of the consul of the United States, and her cargo transhipped, and her master has given up all attempt to prosecute the voyage in her: *Ib.*

The wrongful seizure and sale of a cargo by a consul of the United States is not a loss under a clause in a policy which insures against the acts of pirates and assailing thieves: *Ib.*

In an action on a policy of insurance, the evidence proved that a seaworthy whaling vessel encountered a gale and sprung aleak, which made it necessary to take in sail and put all hands to the pumps, and throw the try-works overboard, in order to lighten her; that the leak was stopped to such an extent that the vessel did not leak except when sail was carried on the foremast, or, even in that case, so as to require more than one

hour in four at the pumps to free her; that the master was of opinion that the leak did not render her unseaworthy and unable to continue the voyage without putting into a port of distress, but was forced by the crew to do so, for reasons which were not distinctly shown; that, while in the port of distress, against his protest, the vessel was surveyed and condemned, but the survey was not put in evidence, although called for by the defendants, and the reasons for the condemnation were not fully disclosed: *Held*, that these facts were insufficient to allow the insured to claim for a constructive total loss of the vessel and outfits, by reason of a necessary sale at a port of distress, from perils of the sea; or of the catchings which had replaced the outfits consumed, and which had been transhipped, in port, into a vessel, which was afterwards wrecked: *Ib.*

Mutual Insurance—Neglect to Pay Assessment where it avoids Policy—Mailing notice sufficient.—A policy of insurance issued by a mutual insurance company, under the conditions and limitations expressed in the by-laws thereto annexed, one of which provides that the policy shall become void, "if the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," is rendered void by the neglect of the assured to pay the amount of an assessment upon his premium note, for thirty days after a written request for payment, prepaid, duly directed, and deposited by the company in the post-office, in due course of mail would reach the place of his residence, as set forth in the policy, whether he received such request or not: *Lothrop & Others* vs. *Greenfield Stock and Mutual Fire Insurance Company.*

NEW YORK COURT OF APPEALS.[1]

Banker—Deposit of Notes and Bills by Customer, how far Changes Property—The property in notes or bills transmitted to a banker by his customer to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor: *Scott* vs. *The Ocean Bank.*

Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing: *Ib.*

It is not enough to warrant such an inference that the customer was a large depositor of money and bills, and constantly drawing drafts against

[1] From E. P. Smith, Esq., Reporter of the Court.

his remittanees, under an arrangement by which he was allowed interest on his average balanees; and that after the banker had transferred a bill remitted to him, after aeceptance but before payment failed, and suspended business at the place where the remittance was reeeived, the customer continued to draw upon him as before at an offiee in another State, where the banker did not suspend business: *Ib.*

These facts create the relation of debtor and creditor in respect to money received by the banker, but are insufficient to charge him with responsibility for a bill previous to payment, and consequently to vest him or his assignee for a precedent debt, with the property in such bill: *Ib.*

Marriage and Legitimacy—Presumption of Intercourse and Counter-Evidence.—The presumption that an intercourse, illieit in its origin, continued to be of that eharacter, may be repelled by a eontrary presumption in favor of marriage, and of the legitimacy of offspring, although the circumstanees fail to show when or how the change from concubinage to matrimony took plaee: *Caujolle* vs. *Ferrie.*

Thus, in support of the legitimacy of a ehild, the faets that the father desired to marry the mother, and that, although he might have maintained a merctricious intercourse without opposition from his family, he abandoned his home and parents to live with her, are some evidence that he did eontract a marriage in fact, prior to the birth of his child: *Ib.*

The presumption is not overeome by the fact that, having declared and caused to be recorded his purpose to solemnize the marriage by the publie acts preseribed by the municipal law of his domicil, such purpose was not shown to have been consummated, and there was an entry upon the record of such deelaration importing that nothing came of it: *Ib.*

Nor is it repelled by the omission in the record of the child's baptism, which took place on the day of its birth, of a statement of its legitimacy, though the usage of the time and place appeared to have been to designate as legitimate in similar documents, contraets, &c., those who were in faet such, and the father, mother, and other relatives were thus designated in the eontemporaneous writings to which they were parties: *Ib.*

The presumption of legitimaey, supported by some facts, sustained against many other circumstances tending to an opposite conclusion: *e. g.*, a reputation at the time of the child's birth that the parents were not married; a separation of the parents very shortly after the birth, and no correspondenee between them for the remaining years of the father's life;

the abandonment of the child by both parents for twelve years; the use by the mother of her maiden name, and the designation by her of the child as her nephew: *Ib.*

Perjury—Witness indictable for, though Incompetent—Husband and Wife, Admissibility of, as Witnesses in Suits inter sese—Not to prove Non-Intercourse, but aliter, after Divorce.—A witness who testifies falsely as to a material fact, is guilty of perjury though he was not a competent witness in the case, and was especially inadmissible to prove the particular fact to which he testified: *Chamberlain* vs. *The People.*

So held, where, in an action for divorce, the husband—his wife having borne a child—testified that he had no sexual intercourse with her during marriage: *Ib.*

It seems (per JAMES, J.,) that, in an action between husband and wife, either party is, since the amendment to the code in 1857, a competent witness against the other, in general, though inadmissible to prove the particular fact of non-intercourse: *Ib.*

Upon an indictment of the husband for perjury, after divorce, the wife is a competent witness to prove that she has had no sexual intercourse with any other person: *Ib.*

Vendor and Vendee—Conveyance Bounding on a Street.—As between grantor and grantee the conveyance of a lot bounded upon a street in a city, carries the land to the centre of the street. There is no distinction in this respect between the streets of a city and country highways: *Bissell* vs. *The N. Y. Cent. R. R. Co.*

So held, where the conveyance contained no reference to the street, by name, but the lot was described by its number, "according to an allotment and survey made by E. J.," upon whose map the lot was represented as abutting upon a street, and the depth of the lot was stated by figures which would not include any part of the street: *Ib.*

The grantor held to have dedicated such street as between him and his grantees, although his map represented it as continuing through the land of an adjoining proprietor, which closed it against any highway in one direction, and such adjoining proprietor never in any manner assented to the continuation of the proposed street, nor was any part of the street adopted as such by the public authorities: *Ib.*

The grantee of all the lots on both sides of the street thus designated, held entitled to the exclusive possession of the proposed street against ejectment by the grantor: *Ib.*

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